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SHDKT PROCEEDINGS AND ORDERS DATE: [07/06/94]

CASE NBR: [93107348] CSY STATUS: [DECIDED]
SHORT TITLE: [Price, Ricky Lee]
VERSUS [North Carolina] DATE DOCKETED: [122993]
*** CAPITAL CASE *** PAGE: [01]

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1 Dec 29 1993 G Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3 Jan 28 1994 Brief of respondent North Carolina in opposition filed.
4 Feb 3 1994 DISTRIBUTED. February 18, 1994 (Page 44)
5 Feb 14 1994 X Reply brief of petitioner Ricky Lee Price filed.
6 Mar 28 1994 G Application (A93-803) for a stay of execution pending the disposition of a petition for certiorari, submitted to The Chief Justice.
7 Apr 7 1994 Application (A93-803) granted by the Chief Justice.
8 Jun 13 1994 REDISTRIBUTED. June 17, 1994 (Page 17)
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15 Jun 30 1994 Petition GRANTED. Judgment VACATED and case REMANDED for further consideration in light of Simmons v. South Carolina, 512 U. S. ------ (1994). Concurring opinion by

*** Related Case - Use VIDE,LS with HF ***

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Last page of docket

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Supreme Court, U.S.
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93-7348

No. 93-____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ORIGINAL

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RICKY LEE PRICE,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

****

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

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80 pp

QUESTIONS PRESENTED

I. WHETHER THE REFUSAL TO ALLOW PETITIONER'S CAPITAL SENTENCING JURY TO CONSIDER, AS MITIGATION, EVIDENCE IT HEARD OF A LIFE SENTENCE IMPOSED ON HIM IN VIRGINIA FOR ANOTHER MURDER THAT WAS FOUND AS AN AGGRAVATING FACTOR AND ARGUED AS EVIDENCE OF PETITIONER'S FUTURE DANGEROUSNESS VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS?

II. WHETHER THE TRIAL COURT'S DIRECTIVE FOR PETITIONER'S ANNOUNCED "HUNG" JURY TO RESUME DELIBERATIONS IN AN EFFORT TO RENDER A SENTENCING RECOMMENDATION, WITHOUT ASSURING THE JURY IT COULD FAIL TO AGREE ON A UNANIMOUS RECOMMENDATION, RISKED A COERCED SENTENCE OF DEATH IN VIOLATION OF THE EIGHTH AMENDMENT?

III. WHETHER AN APPELLATE COURT MAY EVER DISREGARD AS HARMLESS A JURY INSTRUCTION ALREADY FOUND UNCONSTITUTIONAL BY THIS COURT, MCKOY V. NORTH CAROLINA, THAT IMPERMISSIBLY LIMITS THE ABILITIES OF INDIVIDUAL JURORS TO GIVE EFFECT TO MITIGATING EVIDENCE IN A CAPITAL CASE, WHERE SUCH ERROR IS SO FUNDAMENTAL TO THE VALIDITY AND RELIABILITY OF THE CAPITAL SENTENCING PROCESS AND WHERE NO RELIABLE EXTRINSIC EVIDENCE SHOWS THE ERROR HARMLESS BEYOND A REASONABLE DOUBT?

IV. WHETHER THE LOWER COURT APPLIED AN IMPROPER HARMLESS ERROR ANALYSIS TO THE UNCONSTITUTIONAL JURY SELECTION PROCESS THAT VIOLATED MORGAN V. ILLINOIS WHEN IT RELIED ON INQUIRIES OF PROSPECTIVE JURORS THAT WERE IDENTICAL TO THOSE INQUIRIES FOUND TO BE CONSTITUTIONALLY DEFICIENT IN MORGAN ITSELF, IN VIOLATION OF PETITIONER'S RIGHT TO A FAIR AND IMPARTIAL JURY?

V. WHETHER THE PROSECUTOR'S USE OF PETITIONER'S FAILURE PERSONALLY TO EXPRESS AND PURPORTED ABSENCE OF REMORSE AT TRIAL AND SENTENCING, ARISING SOLELY FROM HIS UNWILLINGNESS TO ADMIT GUILT TO THE JURY, RENDERED THE DEATH SENTENCE UNRELIABLE UNDER THE EIGHTH AMENDMENT?

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No. 93-____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

****

RICKY LEE PRICE,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

****

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

****

Petitioner, Ricky Lee Price, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of North Carolina entered on 27 February 1990, as reaffirmed and reinstated after remand on 15 July 1992, as reaffirmed and reinstated after further remand on 30 September 1993.

OPINIONS BELOW

The first opinion of the Supreme Court of North Carolina is officially reported at 326 N.C. 56, 388 S.E.2d 84 (1990), and is reproduced in the Appendix. [App. 1-27] The second opinion of the Supreme Court of North Carolina is officially reported at 331 N.C. 620, 418 S.E.2d 169 (1992), and is reproduced in the Appendix. [App. 30-39] The third opinion of the Suprme Court of North Carolina is officially reported at 334 N.C. 615, 433 S.E.2d 746 (1993), and is reproduced in the Appendix. [App. 42-44]

JURISDICTION

The original judgment of the Supreme Court of North Carolina affirming petitioner's conviction and sentence was entered on 27 February 1990. [App. 28] This Court, on 1 October 1990, vacated that judgment and remanded the case for reconsideration in light of McKoy v. North Carolina, 494 U.S. 433 (1990). After firther briefing and oral argument, the judgment of the Supreme Court of North Carolina, affirming petitioner's conviction and sentence, was reinstated on 15 July 1992. [App. 40] This Court, on 11 January 1993, vacated that judgment and remanded the case for reconsideration in light of Morgan v. Illinois, 504 U.S. ___, 199 L.Ed.2d 492 (1992).

[App. 41] After further briefing and oral argument, the judgment of the Supreme Court of North Carolina, affirming petitioner's conviction and sentence, was reinstated on 30 September 1993.[1] [App. 45] Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a) (1988).

This Court has twice remanded this case for reconsideration by the lower court. On both occasions, the lower court has reconsidered its earlier judgments, found that federal constitutional error occurred in at least two instances during petitioner's capital trial and sentencing hearings, yet concluded that such errors were harmless. This Court must now consider the propriety of these analyses, particularly in light of the recent determination restricting the ability of subsequent reviewing courts to engage in a harmless error review of federal constitutional error to determine if such error is, in fact, harmless beyond a reasonable doubt, as required by Chapman v. California, 386 U.S. 18 (1967). See Brecht v. Abrahamson, 507 U.S. ___, 123 L.Ed.2d 353 (1993). Given the lower court's failure to apply the rigorous Chapman analysis to acknowledged federal constitutional error in petitioner's case, remand for reconsideration in light of Brecht is in order.

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[1]The first opinion of the Supreme Court of North Carolina was filed on 7 February 1990. The second opinion of that court was filed on 25 June 1992. The third opinion of that court was filed on 10 September 1993. The actual judgment of the Supreme Court of North Carolina is entered on the docket by the clerk twenty (20) days after the date an opinion is filed. **N.C. App. P. 32(b).**

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

U.S. Const., amend. VI: In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, ...

U.S. Const., amend. VIII: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const., amend. XIV: No state shall ... deprive any person of life, liberty, or property, without due process of law ....

N.C. Gen. Stat. §15A-2000(b):[2] ... After hearing the evidence, argument of

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[2]N.C. Gen. Stat. §15A-2000 is reproduced in the Appendix. [App. 46-47]

counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following factors: (1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exists; (2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist, and (3) based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors . . . .

N.C. Gen. Stat. §15A-2000(f): Mitigating Circumstances. Mitigating circumstances which may be considered shall include, but not be limited to, the following:

> . . .
>
> (6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.
>
> . . .
>
> (9) Any other circumstance arising from the evidence which the jury deems to have mitigating value.

STATEMENT OF THE CASE

This case presents several fundamental questions of federal constitutional import. Each is worthy of review by this Court due to its significance to the capital punishment jurisprudence of North Carolina and other states. Additionally, this case deserves especial attention because the lower court has twice refused, on reconsideration ordered by this Court, to afford petitioner the full panoply of federal constitutional guarantees to which he is entitled. These refusals by the lower court have exhibited a disregard for the intervening and controlling decisions of this Court.

These important federal constitutional questions include:

1. Whether a trial court in a capital sentencing hearing may refuse to instruct the sentencing jury to consider mitigating evidence supported by the evidence, when that evidence is the punishment imposed--a life sentence--for another murder committed as part of the same course of conduct as the crime for which petitioner is being sentenced, when the sentencing jury relied on that other murder as an aggravating circumstance in the case at bar? The prosecutor argued petitioner's future dangerousness based upon the other murder and the sentencing jury heard considerable testimony about it. Petitioner had no mechanism for having his jury consider the punishment imposed for that murder as mitigation, in violation of the Eighth

Amendment, as explained in Lockett v. Ohio, 438 U.S. 586 (1978), and Penry v. Lynaugh, 492 U.S. 302 (1989). Additionally, petitioner had no opportunity to rebut the aggravating nature of the prior murder, used as an aggravating circumstance, with the evidence of the life sentence imposed for it, in violation of his Fourteenth Amendment right to due process of law, as explained in Gardner v. Florida, 430 U.S. 349 (1977).

2. Whether the trial court unfairly coerced a sentencing recommendation from the sentencing jury after the jury announced it was "hung" as to the appropriate sentencing decision, when it gave supplemental instructions that failed to assure the jury it could simply report its inability to reach a sentencing recommendation to the trial court? This issue presents the important Eighth and Fourteenth Amendment question left open by this Court in Lowenfield v. Phelps, 484 U.S. 231 (1988), where the supplemental instructions expressly told the sentencing jury that a life sentence would be imposed if it failed to reach a unanimous sentencing decision. The instructions given to petitioner's sentencing jury had no such saving language.

3. When, if ever, may an appellate court disregard as harmless error a jury instruction, already found by this Court to be unconstitutional, McKoy v. North Carolina, 494 U.S. 433 (1990), that impermissibly limits the ability of individual jurors to

consider and give effect to mitigating evidence in the sentencing phase of a capital case? This important question was left unanswered in McKoy and has never been addressed by this Court. Furthermore, the quality of a harmless error determination by a lower court on direct review of a capital trial marred by federal constitutional error must be vigorously scrutinized in light of the more lenient standard governing review of federal constitutional claims in habeas corpus after Brecht v. Abrahamson, 507 U.S. ___, 123 L.Ed.2d 353 (1993). Indeed, this case presents an opportunity for this Court to explicate the appropriate analysis required to find federal constitutional error "harmless beyond a reasonable doubt" on direct appeal in light of Brecht.

4. When, if ever, may an appellate court find a violation of Morgan v. Illinois, 504 U.S. ___, 119 L.Ed.2d 492 (1992), harmless beyond a reasonable doubt when such a violation occurred in the jury selection of petitioner's capital trial and several veniremembers served as jurors and sentenced petitioner to death without him being able to ask them if they could fairly consider life as a possible sentence in his case? The lower court, on remand from this Court in light of Morgan, acknowledged error under Morgan occurred in the selection of petitioner's capital jury. Its finding that this federal constitutional error was "harmless beyond a reasonable doubt" because the trial court explained the North Carolina

capital sentencing process to prospective jurors and then allowed petitioner to inquire if these prospective jurors could follow those instructions cannot render a violation of basic federal constitutional provisions harmless. Such a holding is squarely at odds with Morgan itself. Thus, the lower court failed to follow this Court's directive to reconsider its judgment in light of Morgan.

5. When petitioner relies on the presumption of innocence and exercises his federal and state constitutional rights not to testify at either phase of his capital trial, may the prosecutor argue the absence of petitioner's remorse as a reason for the jury to sentence him to die? This argument infringes on the important right not to testify. The manner in which the argument was made against petitioner amounted to an impermissible comment on his failure to testify, which violated the spirit if not the letter of Griffin v. California, 380 U.S. 609 (1965).

A. Procedural Developments.

Petitioner was indicted on a charge of first degree murder. After a jury trial, he was convicted of murder in the first degree. After a separate sentencing hearing, the same jury recommended that petitioner be sentenced to death and the presiding judge imposed a sentence of death. Petitioner appealed and the judgment was stayed. The Supreme Court of North Carolina affirmed the conviction and sentence. State v. Price, 326 N.C. 56, 388 S.E.2d 84 (1990). This Court issued a writ of certiorari, vacated the judgment, and remanded the case for further consideration. Price v North Carolina, 498 U.S. 802 (1990). On remand, the Supreme Court of North Carolina reaffirmed and reinstated its judgment. State v. Price, 331 N.C. 620, 418 S.E.2d 169 (1992). This Court again issued a writ of certiorari, vacated the judgment, and remanded the case for further consideration. Price v. North Carolina, 113 S.Ct. 955 (1993). On remand, the Supreme Court of North Carolina reaffirmed and reinstated its judgment. On both remands, the lower court found the federal constitutional errors perceived by this Court harmless. It did not find either of the intervening decisions inapplicable to the facts of petitioner's capital trial and sentencing hearing.

B. Factual Background.

On the Sunday morning of 21 October 1984, Anne and Tony Wrenn were walking their son, Bryant, along a wooded area. They saw a man, crouching near the ground. He picked up something and began to run. The Wrenns then noticed a woman on the ground where the man had crouched. Anne Wrenn went to obtain assistance or help, while Tony Wrenn chased the man with his son's nanchaku. Both Anne and Tony Wrenn identified petitioner as the man they saw in the woods.

Dr. Thomas Long, a medical examiner, examined the woman's body found by the Wrenns. The victim was dead. Dr. Robert L. Thompson, a forensic pathologist, conducted an autopsy and concluded the victim, Brenda Leigh Smith, died of a ligature strangulation. An object had been placed around her neck and pulled in such a fashion that blood would not go to her brain.

Brenda Smith, who lived with her parents at the time of her death, was dating petitioner. According to her mother, petitioner telephoned Brenda on 29 October 1984

and came over to visit her. Brenda and petitioner left for Greensboro, driving two cars. According to her mother and father, Brenda telephoned them the next day at approximately 8:45 a.m. Her father took the collect call. They talked for fifteen to twenty minutes. The Smith's telephone bill showed a collect call from a telephone number, dated 21 October 1984. This number was for a telephone at a gasoline station approximately twenty-two miles from the place where Brenda Smith's body was found.

Elaine Clay met petitioner at a night club in Danville, Virginia in October 1984. When she came home from work on Thursday before the weekend in question, petitioner was mowing her yard. He told Clay he wanted to move in with her, in part to get away from Joan Brady. Clay agreed to allow petitioner to leave one set of clothes at her house. Instead, he left.

Janice Bates lived with petitioner in Danville from June 1983 to September 1984. She claimed she heard his voice on 22 October 1984 between midnight and 2:30 a.m. outside her trailer. The next morning, she noticed some window screens had been removed on the outside of her trailer.

On the evening of 22 October 1984, Darryl Gammon went to his uncle's house in Danville, Virginia. Gammon heard voices from downstairs and he found James Hardy with his hands tied behind him and a rag in his mouth. Petitioner was behind a curtain with a flashlight and a knife. Gammon attempted to restrain petitioner with a gun, but he pulled a knife on his cousin. While holding a knife to Tony Irwin's throat, petitioner made Gammon give him the gun. Petitioner held police officers at bay for approximately five and one-half hours before they managed to arrest him. They seized Brenda Smith's class ring from petitioner along with a key ring with the words "Certified Crazy Person" engraved on it. Brenda Smith's sister identified the rings and key chain taken from petitioner as belonging to the victim.

Susan Pyron testified that her sister, Joan Brady, had been killed on 19 October 1984. She identified a photograph of her sister's body that showed her face down on the bed with her hands tied behind her back with shoe strings and a handkerchief tied tightly around her neck. Joan Brady died of a ligature strangulation.

Jerald Inman, who had been incarcerated with petitioner in the Danville jail, reiterated that petitioner admitted killing Brenda Smith and Joan Brady. According to Inman, petitioner had been dating too many people. Things had begun building up on him. He felt he had to eliminate somebody.

C. **Penalty-Phase Evidence.**

During the early morning hours of 22 October 1984, Elaine Clay was awakened by the sound of her smoke detector. She and her nine-year old son noticed smoke coming from under the basement door. They left the house and neither was injured. The fire marshall visited the Clay house. In his opinion, he felt the fire was intentionally set. Detective Tom Brown was present at the Hardy house and heard petitioner say a friend of his had burned Elaine Clay's house. Detective Buddy Holley, however, claimed petitioner said he had burned Elaine Clay's house and she "got what she deserved."

The state introduced a judgment from Virginia indicating petitioner had been convicted of murdering Joan Brady and received a life sentence. Holley testified that Joan Brady was the victim in that case.

Cleo Price, petitioner's mother, gave a vivid description of his childhood. About the time he turned fourteen, he began to exhibit signs of anger and high emotions. When he encountered legal difficulties, he was housed and treated at Dorothea Dix

Hospital, a state psychiatric and mental health facility, for six to eight weeks and then transferred to Butner, a similar federal facility, for seven or eight additional months. After he was hospitalized at Butner, petitioner seemed to be much better and was under more control. Nevertheless, his mental health problems continued. He was hospitalized at Butner three additional times before he reached the age of eighteen. Additionally, petitioner was hospitalized at Southwestern State Hospital in Marion, Virginia for seven or eight months when he was eighteen.

His mother also revealed a long history of psychological and psychiatric problems in her family. She had been hospitalized herself for four or five months for psychological problems when petitioner was five years old. She related instances of her hospitalization for mental and emotional problems in 1980 and 1986. Indeed, she was still under psychiatric care at the time of petitioner's trial.

She further explained that her sister and brother had psychiatric problems. A history of mental disorders ran in her family on her father's side. Her sister had been hospitalized for emotional problems on two occasions and her brother had similar in-patient treatment on one occasion. Her cousin had also been hospitalized on four or five occasions for psychiatric reasons.

Petitioner testified that his life was relatively uneventful during his early years, including his time in elementary school. After he reached the seventh grade, he began "hanging around with [people who] smoked dope and different things." He was first placed in a mental institution when he was "about fifteen years old." He recalled being sent to Dorothea Dix Hospital, placed in a management ward, and strapped to a bed. He spent at least sixteen months at Dix during that initial stay. After this commitment, he was hospitalized at both John Umstead Hospital and Butner. Each of these commitments lasted at least four to six months. He was nineteen at the time of his final

hospitalization at Butner. His final hospitalization was caused by using acid or LSD.

He related that he had received a fifty-year prison sentence for the hostage situation at the Hardy residence. He denied killing Brenda Smith and Joan Brady.

Michael Dennis Hancock, who knew petitioner well, saw him the night after Joan Brady was killed. Petitioner's "eyes didn't look right" and Hancock felt he was under the influence of drugs.

Dr. Arthur Centor, a forensic psychologist, testified regarding his evaluation of petitioner. Dr. Centor explained that petitioner had been committed civilly to mental hospitals on several occasions. During an early commitment to Southwestern State Hospital, petitioner was hospitalized from 12 January 1978 to 1 June 1978. He was diagnosed as having a manic-depressive illness, which Dr. Centor described as serious. According to the medical records, during this commitment petitioner denied that he was Ricky Price. He indicated his named was Carlos Rodriguez. He denied, however, having false perceptions. These reports concluded that petitioner showed "evidence of severe thought disturbances and that some of his utterances were apparently delusional, that is, having a false belief, and that his affect or emotions . . . appeared to be manic in character, manic meaning elated, up as opposed to depressed." The report concluded he was not malingering.

Dr. Centor found petitioner functioned at the borderline level of intelligence with an I.Q. between 70 and 79. Dr. Centor felt he was "closer to mental retardation." A person of that intellectual functioning would have a more difficult time faking or malingering on psychological tests.

During an admission at John Umstead Hospital in 1974, petitioner was diagnosed as being a paranoid schizophrenic. This diagnosis involved petitioner having

a thought disorder of a type that contained delusions and paranoia, thoughts that "people were against him or trying to hurt him or something of that type. Paranoia being abnormal thinking." At the subsequent admission in 1975, doctors reached the same diagnosis. Dr. Centor explained that "schizophrenia is a condition which is not organic. It comes from the life of the individual, the stresses, strains of living, the inability almost to cope with life, to deal with life." The continual use of drugs can cause the development of a mental disorder. One could even have a major episode involving a mental disorder from ingesting just a moderate amount of drugs, especially acid or LSD. An episode might last as long as four to six weeks. During his 1975 institutionalizations, doctors continued petitioner on psychotropic medication. They also found no indication of malingering.

Dr. Centor also relied upon records from a 1977 admission to John Umstead Hospital. These records indicated this admission was petitioner's fifth commitment to that institution. It was an involuntary commitment. The records revealed petitioner had "a history of recurring psychotic behavior and was overactive, agitated, hostile, threatening, and had been in several fights resulting in bodily injuries to others." Dr. Center explained that psychotic behavior was "the extreme form of mental illness which is more than neurosis and neurotic." The reports again contained no suggestion of malingering.

On cross-examination Dr. Center explained that he felt petitioner was faking his condition to try and avoid a death sentence. Part of the hospital records indicated a statement by petitioner to that effect.

Dr. Selwyn Rose, a forensic pathologist, explained petitioner had an enormous history of mental illness. Every doctor who had treated petitioner prescribed strong anti-psychotic medications. Petitioner suffered from "personality disturbances which

[were] quite profound." He had poor impulse control which, combined with his limited mental state, created "a very serious group of mental illnesses, which [defendant] has and has had probably since he was a child."

Dr. Rose felt petitioner's mental condition would have impaired his ability to make judgments and control impulses in October 1984. His drug abuse, combined with his mental illness and limited intellectual capacity, completely distorted his thinking. They combined to impair his ability to make judgments, rational decisions, and control his impulses. Petitioner suffered from a very impaired control system due to his mental illness and drug abuse.

Janice Bates told the jury she had lived with petitioner for a period of time until September 1984. She believed that he was taking drugs during this period of time. She saw him a week before Joan Brady was killed and noticed that he was acting very differently from when he was merely drinking.

Dr. Brad Fisher, a clinical forensic psychologist, concluded petitioner suffered from a major mental illness. One of the strong indications of the seriousness of petitioner's mental condition was the level and consistency of medication with psychotropic drugs. Dr. Fisher also relied upon the history of mental illness in petitioner's family. In his opinion, petitioner suffered from a serious mental illness in October 1984 that would have impaired his ability to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law.

Jerald Inman testified as a rebuttal witness for the state. He related that petitioner had told him he had "to go the insanity route" as it was his only opportunity to escape. He felt it was necessary for him to convince the courts that he was crazy. In Inman's opinion, he saw nothing wrong with him from November 1984 to January 1985.

MANNER IN WHICH THE FEDERAL CONSTITUTIONAL QUESTIONS WERE RAISED AND DECIDED BELOW

Each of the questions raised in this petition were presented to the Supreme Court of North Carolina based upon violations of specific federal constitutional provisions. The court rejected each claim on the merits.[3] Thus, each federal constitutional claim was properly presented and reviewed below and is appropriate for this Court's consideration. *See generally Mullaney v. Wilbur*, 421 U.S. 684 (1975).

I. THE REFUSAL TO ALLOW PETITIONER'S CAPITAL SENTENCING JURY TO CONSIDER, AS MITIGATION, EVIDENCE IT HEARD OF A LIFE SENTENCE IMPOSED ON HIM IN VIRGINIA FOR A MURDER THAT WAS USED AS AGGRAVATION VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS.

Petitioner timely sought to have the trial court instruct the sentencing jury that it could consider, as mitigation, evidence of the life sentence he received for the murder of Joan Brady -- a murder about which the prosecution offered considerable evidence and which the jury eventually found as an aggravating factor. The trial court denied petitioner's request. In affirming this action, the Supreme Court of North Carolina declared this life sentence "is not a circumstance which tends to justify a sentence less than death" and is "irrelevant" to the capital sentencing decision. [App. 38] *State v. Price*, 331 N.C. 620, 634-45, 418 S.E.2d 169, 177 (1992). This decision is wholly at odds with this Court's settled jurisprudence. *E.g., Skipper v. South Carolina*, 476 U.S. 1 (1986); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978);

[3] Although the state argued some of these claims were procedurally barred, the court below explicitly declined to foreclose consideration of each claim on its merits and resolved each federal constitutional claim raised herein on the merits. *State v. Price*, 331 N.C. 620, 630, 418 S.E.2d 169, 174-75 (1992); *State v. Price*, 326 N.C. 56, 87, 388 S.E.2d 84, 102, *vacated and remanded*, 494 U.S. ___, 112 L.Ed.2d 7 (1990).

see also Penry v. Lynaugh, 492 U.S. 302 (1989); *Hitchcock v. Dugger*, 481 U.S. 393 (1987). This life sentence was a part of petitioner's background and record that he was entitled to have the sentencing jury consider in deciding whether he should live or die. Furthermore, it bore directly on the force and weight of the aggravating circumstance that petitioner previously had been convicted of a crime involving the use of violence to the person -- a factor proved by and found based upon his conviction for the murder of Joan Brady. Due process entitled petitioner to argue, and the sentencer to consider, evidence of the life sentence for this murder in response to this proffered aggravation. *E.g., Gardner v. Florida*, 430 U.S. 349 (1977). The lower court's rejection of these claims presents an important question to the capital sentencing jurisprudence, both in North Carolina and beyond. Review by this Court is in order.[4]

A. The Lower Court Erred In Sustaining The Trial Court's Refusal To Instruct The Jury That It Could Consider Evidence Of Petitioner's Current Life Sentence As Mitigating.

The sentencer in a capital case may "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Equally clear is a corollary rule that the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.'" *Skipper*, 476 U.S. at 4 (citations omitted) (quoting *Eddings*, 455 U.S. at 110, 114). Once evidence was presented which the jury could reasonably find had mitigating value, petitioner had a

[4]The lower court rejected this argument, in part, because it considered petitioner's parole eligibility to be irrelevant to the capital sentencing decision. This Court has that issue before it in Simmons v. South Carolina, No. 92-9059. The instant case will be guided, if not controlled by Simmons. This petition may be held pending the forthcoming decision in Simmons.

constitutional right to have the trial judge submit this mitigating circumstance to the jury for its determination. *Lockett*, 438 U.S. at 605. To prevent the capital sentencer from giving independent mitigating weight to aspects of petitioner's record "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Id.*

North Carolina's capital sentencing scheme required petitioner's capital sentencing jury to deliberate on and resolve unanimously four questions before it could render a sentence of death. First, the jury must have unanimously agreed that the state proved at least one aggravating circumstance beyond a reasonable doubt. Second, the jury must have unanimously decided whether petitioner unanimously proved by a preponderance of the evidence the mitigating circumstances submitted to it by the trial court. The trial court was required to submit in writing to the jury and give oral instructions on any statutory or non-statutory mitigating circumstances supported by any evidence and requested by petitioner. *See State v. Cummings*, 326 N.C. 298, 389 S.E.2d 66 (1990) (non-statutory mitigating factors must be listed individually and separately on verdict form); *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988) (trial court must submit and instruct on all requested non-statutory mitigating factors supported by the evidence). Third, the jury must have unanimously determined beyond a reasonable doubt that the mitigating circumstances found to exist did not outweigh the aggravating circumstances found to exist. Finally, the jury must have unanimously determined beyond a reasonable doubt that the aggravating circumstances found to exist were sufficiently substantial, when considered in light of the mitigating circumstances found to exist, to warrant the imposition of the death penalty. N.C. Gen. Stat. §15A-2000.

Petitioner specifically requested that the trial court instruct the jury on the non-statutory mitigating circumstance that he had received a life sentence in Virginia for

another killing, about which the prosecution had introduced evidence, and argued showed dangerousness. [App. 86-88] Upon the prosecutor's objection, the trial court declined to submit this non-statutory mitigating factor. [App. 88] Unquestionably, the evidence supported this mitigating circumstance as the state itself introduced into evidence the historical fact of petitioner's life sentence for the killing of Joan Brady in Virginia several days before the death of Brenda Smith.

The fact that petitioner had been given a life sentence for this Virginia crime could have been deemed mitigating by his jury. Any aspect of his record can be mitigating if it would serve "as a basis for a sentence less than death." *Eddings*, 455 U.S. at 110. Given the fact that the jury had heard voluminous testimony regarding the killing of Joan Brady in Virginia and found it to be an aggravating circumstance, the imposition of a substantial penalty -- a life sentence -- for this killing could have served as a basis for a sentence less than death in the present case. In this context, it had mitigating value.

Axiomatically, the life sentence imposed on petitioner for his Virginia murder conviction, which was imposed shortly before his trial in this case, had potential value as mitigation. It was not "irrelevant" as the lower court concluded. Rather, it had mitigating value as a matter of constitutional law. One of the most settled principles of Eighth Amendment jurisprudence is that mitigation includes "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U.S. at 604. The life sentence defendant received for Joan Brady's murder in Virginia was an aspect of petitioner's record. Any aspect of a defendant's background, even if not related specifically to his culpability for the crime he committed, is mitigating if it allows inferences that might serve as being a basis for a life sentence in the eyes of his

sentencer.[5] *Skipper*, 476 U.S. at 4-5.

As a fundamental evidential matter, the life sentence imposed on petitioner for the Virginia conviction was not irrelevant. It is analogous to a situation in which a perpetrator is wounded and paralyzed in the course of a killing. If petitioner had been shot by police officers when he was accosted and arrested and, as a result of this shooting, had been paralyzed, this fact would certainly be relevant to the sentencing determination as a matter of evidence law as well as a matter of constitutional law. Evidence is relevant if it tends to make any fact an issue more or less likely. *McKoy v. North Carolina*, 494 U.S. 433, 440 (1990) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 345 (1985)); *see* Fed. R. Evid. 401; N.C. R. Evid. 401. When his sentencer undertook the determination of whether a life or death sentence was appropriate, the fact of his paralysis would be relevant. It would certainly be relevant as a matter of constitutional law for mitigation purposes as it would be an aspect of his background and might well serve as a basis for a sentence less than death. Whatever favorable inference the sentencer might draw from the historical fact of his paralysis -- such as a diminished likelihood of escape or danger to others during incarceration -- petitioner would be entitled to that inference as a matter of constitutional law. In the same way, his certain, previously imposed life sentence in Virginia could have led to a favorable inference by the jury in this case.

The lower court's rather perfunctory rejection of this claim reveals an apparent misunderstanding of *Lockett* and its progeny. Seizing on a footnote in *Lockett* itself, the lower court dismissed this evidence as irrelevant.

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[5] *Skipper* also settled the question of whether factors may be mitigating that occur after petitioner's crime but before his sentence. *Skipper* held that a defendant's good behavior during his incarceration awaiting trial and sentence -- conduct that occurred after the crime was committed -- was relevant evidence in mitigation of punishment. 476 U.S. at 4. Quite plainly, the fact that the Virginia life sentence was imposed after petitioner's crime does not diminish its potential mitigating effect or render it somehow irrelevant.

> That defendant is currently serving a life sentence for another unrelated crime is not a circumstance which tends to justify a sentence less than death for the capital crime for which defendant is being sentenced. Although the sentence comprises part of his formal criminal record and was offered against defendant by the State in the sentencing hearing, "the additional protection to society" possibly achieved by his incarceration under that sentence is not an aspect of defendant's record. Because this evidence was irrelevant, we uphold the trial court's refusal to submit it as a mitigating circumstance. *See Lockett*, 438 U.S. at 604 n.12, 98 S.Ct. at 2964-65 n.12, 57 L.Ed.2d at 990 n.12 ("Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense").

[App. 38] *Price*, 331 N.C. at 634-35, 418 S.E.2d at 177. No court, including the Supreme Court of North Carolina, may simply declare evidence to be irrelevant as mitigation. "[T]he mere declaration that evidence is 'legally irrelevant' to mitigation cannot bar the consideration of that evidence if the sentencer could reasonably find that it warrants a sentence less than death." *McKoy*, 494 U.S. at 441. Indeed, *Skipper* reversed a determination that evidence of a defendant's adjustment to prison life was irrelevant, 476 U.S. at 7, and *Eddings* reversed a determination that evidence of a defendant's troubled childhood and emotional disturbance was irrelevant because it did not support an excuse for the crime. 455 U.S. at 113-16. *Skipper* and *Eddings* demonstrate that footnote 12 in *Lockett* is not carte blanche for lower courts simply to declare certain types of evidence legally irrelevant as potential mitigation.

Yet, "it is not enough simply to allow [petitioner] to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989). In *Penry*, constitutional error occurred where the sentencer had no mechanism for considering the defendant's evidence of mental retardation or abused childhood. His sentencing

jury was never instructed that it could consider this evidence, which it heard, as mitigating evidence and that to could give mitigating effect to that evidence in imposing sentence. *Id.* at 320. Likewise, petitioner's jury was never instructed, despite a specific request for such an instruction, that it could consider evidence of the life sentence as mitigating and give mitigating effect to it in sentencing him. As in *Penry*, "in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of [petitioner's life sentence] by declining to impose the death penalty, . . . the jury was not provided with a vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision." *Id.* at 328. *Lockett* and *Eddings* compelled this Court to remand *Penry* for resentencing to avoid the "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Id.* (quoting *Lockett*, 438 U.S. at 605; *Eddings*, 455 U.S. at 119 (O'Connor, J., concurring)). Similarly, *Penry*, *Lockett*, and *Eddings* compel a remand here.

B. The Lower Court Erred In Approving The Trial Court's Action Prohibiting Petitioner's Counsel From Arguing The Mitigating Effect Of Petitioner's Current Life Sentence.

The trial court also precluded, with the later approval of the Supreme Court of North Carolina, defense counsel from arguing legitimate matters of evidence and applicable legal principles that might have served as a basis for a sentence less than death. Both rejected the request of petitioner's counsel to argue to the jury below the effect of the life sentence petitioner received in Virginia for the murder of Joan Brady and the statutory provision allowing any life sentence imposed by the jury in this case to run consecutively to and commence at the expiration of this life sentence or any other sentence previously imposed outside North Carolina. It is beyond peradventure that *Lockett* and its progeny prohibit statutes, evidentiary rulings, and jury instructions that

preclude the sentencer from considering "factors which may call for a less severe penalty." The trial court's restrictions upon petitioner's closing arguments not only ran afoul of this constitutional prohibition, but also denied petitioner due process of law because petitioner's "death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." *Gardner v. Florida*, 430 U.S. 349, 362 (1977). The prosecutors argued at length about petitoner's dangerousness. [App. 97-98, 101-02, 103-05] By denying petitioner an opportunity to argue about the Virginia life sentence and the North Carolna law on consecutive sentences, the lower courts robbed him of his opportunity under *Gardner* to rebut this evidence and respond to these arguments.

In North Carolina, counsel may argue the law as well as the facts of a case to the jury. "In jury trials the whole case as well of law as of fact may be argued to the jury." N.C. Gen. Stat. §84-14; *see State v. Murray*, 310 N.C. 541, 313 S.E.2d 523 (1984); *State v. Hardy*, 299 N.C. 445, 263 S.E.2d 711 (1980). For example, a defense lawyer must be permitted to read to the jury statutory provisions prescribing the punishment for the crime charged. *E.g., State v. Irick*, 291 N.C. 480, 213 S.E.2d 833 (1977); *State v. McMorris*, 290 N.C. 286, 225 S.E.2d 553 (1976). This Court has explicitly rejected "the erroneous premise that the participation of counsel is superfluous to the process of evaluating the relevance and significance of aggravating and mitigating facts." *Gardner*, 430 U.S. at 360. If this participation would not be superfluous when the ultimate sentencing decision is made by a trial judge, as in *Gardner*, it surely would not be inconsequential here where the final sentencing decision is made by the jury. *See* N.C. Gen. Stat. §15A-2002 (requiring trial judge to impose whatever sentence is recommended by the jury in a capital case).

> Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases.

Gardner, 430 U.S. at 360.

The prosecution was permitted to introduce, over petitioner's objections, the Virginia judgment rendered in the Joan Brady case. This included language that "Ricky Lee Price is hereby sentenced to confinement in the penitentiary of this Commonwealth for life under Indictment One for murder . . . ." Once the prosecution was permitted to introduce this evidence to support one of its submitted (and eventually found) aggravating circumstances, petitioner was entitled not only to offer evidence calculated to mitigate its possible effect, *Skipper*, 476 U.S. at 5, but also to rebut it altogether. *Gardner*, 430 U.S. at 362.

Furthermore, the state argued the Joan Brady murder not only showed a prior violent crime, but also petitioner's dangerousness. The evidence "in the guilt phase showe[ed] you the way in which this murder was carried out." [App. 97] Both of the psychiatrists "agree that the defendant is dangerous and is dangerous to others." [App. 98] With respect to the death of Joan Brady the prosecutor asked,

> Why did he kill Brenda? He admitted on the stand that a month before he talked about the Boston strangler movie where the defendant got off on an insanity defense to Mrs. Barley, Joan Brady's mother. So when Joan kicked him out and he went to Elaine Clay and she said, "You can't move in here," and he decided and formulated a plan to kill Joan Brady, and after he had done so and the days passed and he realized, "If I kill another one the same way, they are going to think I'm crazy. I've got this long track record, I can use it to my advantage." And so he turns what should be a mitigating facgtor into an aggravating factor. He turns it into a motive to kill Brenda Smith. His murder of Joan Brady led

directly to the murder of Brenda Smith.

[App. 100-01] Petitioner was entitled to resond with the applicable facts and law regarding life sentences.

During a colloquy between the trial court and counsel for both sides, outside the presence of the jury, petitioner proffered:

> My argument to the jury would be that the Court has it within its power and discretion to impose a life sentence which would run at the end of the life sentence which the defendant is serving in the State of Virginia.

At that juncture, the trial court told defense counsel "you may not argue that to the jury." This limitation was constitutionally unacceptable.

In the first place, this proposed argument was an accurate statement of the statutory law in North Carolina and was not misleading to the jury.

> When multiple sentences of imprisonment are imposed on a person at the same time or when a term of imprisonment is imposed upon a person who is already subject to an undischarged term of imprisonment, including a term of imprisonment in another jurisdiction, the sentences may run either concurrently or consecutively, as determined by the Court.

N.C. Gen. Stat. §15A-1354(a). Furthermore, the mitigating effect of consecutive sentences is obvious when further resort is had to the law in North Carolina. "When it is a consecutive sentence, it commences to run when the State has custody of the defendant following completion of the prior sentence. N.C. Gen. Stat. §15A-1355(a). The meaning of these two statutory provisions are clear and unmistakable. The trial court was empowered to impose a life sentence recommended by petitioner's jury

consecutive to the life sentence he was presently serving in Virginia, a fact about which his jury was already aware. Furthermore, the jury would doubtlessly conclude that if it recommended a life sentence for petitioner and the trial court imposed it consecutive to the Virginia life sentence, then the life sentence recommended in this case would begin *only after* the Virginia life sentence had expired.

The lower court resolved this issue by calling it an "argument about the legal effect of parole upon [petitioner's] sentence . . . in another guise. [App. 17] *Price*, 326 N.C. at 84, 388 S.E.2d at 100. In claiming it was simply not relevant, the court misapprehended the thrust of the proffered argument. It ignored the mitigating potential of consecutive life sentences. Furthermore, petitioner's sentencing jury was allowed to find and consider as an aggravating factor in this case that he had "been previously convicted of a felony involving the use of violence to the person; felony involving the use of violence to the person; to wit: the conviction of murder arising out of the death of Joan Brady which occurred October 18, 1984." [App. 43] *See* N.C. Gen. Stat. §15A-2000(e)(3). The trial court's ruling allowed petitioner to be sentenced to death based on information he had no opportunity to explain to the sentencer in violation of the Fourteenth Amendment right to due process explained in *Gardner*, 430 U.S. at 362.

The prosecutors frequently described petitioner in their arguments as "a dangerous man." [App. 97] They urged the jury to protect Elaine Clay and others since the jury could not protect Brenda Smith and Joan Brady -- protection accomplished only by sentencing petitioner to death.

> You weren't able to protect the life of Joan Brady.
> You weren't able to protect the life of Brenda Smith.
> You have a duty. You must discharge it . . . .

> He has endangered the life of Elaine Clay and Robbie Davis . . . .
>
> The defendant is dangerous. The defendant says . . . "I don't care, Babe. Listen Carol, I kill your dumb ass, bitch, whore, whatever." Dangerous. Some girl named Carol. We don't even know who she is. He knows who she was.
>
> . . .
>
> You can protect Elaine Clay. You can protect nine-year-old Robbie Davis. You're all they have now.

[App. 105-06] This argument stressed petitioner's future dangerousness and opened the door for the appropriate rebuttal and explanation proffered by petitioner, but denied by the lower courts.

This error prejudiced petitioner by foreclosing his constitutional right to explain to the capital sentencing jury facts and circumstances that might lead it to fix punishment at something other than death. As *Gardner* made clear, precluding a capital defendant from being able to explain sentencing evidence offends basic Eighth and Fourteenth Amendment principles. "[I]t is possible that full disclosure, *followed by explanation or argument by defense counsel*, would have caused [a different sentencing] verdict." 430 U.S. at 362 (emphasis added).

Certainly, the prospect that petitioner might face two, consecutive life sentences, the second of which could only begin under settled North Carolina law at the expiration of the first, might lead the sentencer in this case to fix punishment at something less than death. Petitioner was almost thirty-years old at the time of his trial.[6] In

[6] Under the applicable provisions for a life sentence in North Carolina, he would not even be eligible for parole until he has served at least twenty years on his North Carolina sentence. *See* N.C. Gen. Stat. §15A-1371.

combination with a pre-existing Virginia life sentence imposed only two years before, petitioner's jury could be more assured of his continued confinement away from members of society for an extremely long period of time. This evidence also showed the substantial punishment petitioner received for a prior murder the jury found as a factor that aggravated petitioner's instant crime. Counsel could have used it to explain or rebut the force of this aggravating circumstance. These inferences, wholly consistent with and reasonably inferable from the law applicable to this case, could easily serve as a basis for a sentence less than death. The lower court misapprehended the teachings of this Court in this area. Accordingly, review by certiorari is in order.

II. THE TRIAL COURT'S DIRECTIVE FOR PETITIONER'S ANNOUNCED "HUNG" JURY TO RESUME DELIBERATIONS IN AN EFFORT TO RENDER A SENTENCING RECOMMENDATION, WITHOUT ASSURING THE JURY IT COULD RETURN WITHOUT AGREEING ON A UNANIMOUS RECOMMENDATION, RISKED A COERCED SENTENCE OF DEATH IN VIOLATION OF THE EIGHTH AMENDMENT.

After petitioner's jury deliberated as to punishment for three hours and forty-two minutes, in two sessions divided by an overnight recess, it signaled to the trial judge a desire to return to the courtroom. When the jury indicated in open court that it did not have a question, the trial court inquired why it had knocked on the door of the jury room. The jury foreman told the trial court, "We're hung." [App. 91] At this juncture, petitioner requested the trial court to impose a life sentence upon the jury's inability to reach a verdict. *See* N.C. Gen. Stat. §15A-2000(d). The trial court denied this request and, over petitioner's objection, instructed the jury that it had a duty to deliberate with a view toward reaching a sentencing recommendation. [App. 95-96] At no point, however, did the trial court inform the jury of the effect of its inability to reach a

unanimous recommendation, which, in North Carolina, is the imposition of a life sentence by the presiding judge. N.C. Gen. Stat. §15A-2000(d). After fifty-eight minutes of further deliberations, the jury returned a recommendation of death. Instructing a deadlocked jury of the need for it to continue its deliberations in an effort to reach a sentencing recommendation, without explaining the consequences of a deadlocked jury, improperly pressured dissenting jurors to surrender their convictions as to the appropriateness of a life sentence. *Lowenfield v. Phelps*, 484 U.S. 231, 239-40 (1988). Given the qualitative difference between a sentence of life imprisonment and a death sentence with its finality, the reliability of a sentence of death as the appropriate punishment in this case vanished. *Woodson v. North Carolina*, 420 U.S. 280, 305 (1976).

This case squarely presents the issue left open in *Lowenfield* regarding the unconstitutionally coercive effect of supplemental instructions to a deadlocked capital sentencing jury, where the supplemental instructions do not inform the jury it is permissible for the jury to fail to reach a unanimous decision. In light of the importance of this issue to capital sentencing proceedings and the division among the highest courts of many jurisdictions, this Court should issue a writ of certiorari.

After deliberating for nearly four hours, petitioner's jury voluntarily returned to the courtroom. When the trial court found the jury did not have a question, it inquired as to why the jury had knocked on the door. The foreman of the jury then informed the trial court that it was deadlocked as to a sentencing recommendation. After consulting with counsel, denying petitioner's request that a life sentence be imposed, and overruling his objections to the court's decision to give the jury further instructions, the trial court made the following statement to the jury:

> Members of the jury, I'm going to ask that you resume your deliberations in an attempt to return a recommendation. I have already instructed you that *your recommendation must be unanimous*, that is, *each of you must agree on the recommendation*. I shall give you these additional instructions.
>
> First, it is your duty to consult with one another and to deliberate with a view to reaching a recommendation if it can be done without violence to the individual judgment.
>
> Second, each of you must decide the case and your recommendation for yourself, but only after an impartial consideration of the evidence with your fellow jurors.
>
> Third, in the course of your deliberations you should not hesitate to reexamine your own views and change your opinion of you become convinced it is erroneous. On the other hand, you should not hesitate to hold to your own views and opinions if you remained convinced they are correct.
>
> Fourth, none of you should surrender an honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a recommendation.
>
> Please be mindful that I am in no way trying to force or coerce you to reach a recommendation. I recognize the fact that there are sometimes reasons why jurors cannot agree. Through these additional instructions I have just given you, I merely want to emphasize that it is your duty to do whatever you can to reason the matter over together as reasonable people and to reconcile your differences if such is possible without the surrender of conscientious conviction to reach a recommendation.

[App. 95-96] (emphasis added). In the context of the present case, these supplemental instructions risked the possible coercion of a recommendation of death in contravention of the Eighth Amendment as acknowledged in *Lowenfield*.

These facts raise a spectre of coercion from the supplemental instructions. Once the trial court had given these supplemental instructions, the jury deliberated for just over three-fourths of an hour before returning a recommendation of death. The jury's returning with its sentencing recommendation "soon after receiving the supplemental instruction . . . suggests the possibility of coercion." *Lowenfield*, 484 U.S. at 240; *United States v. United States Gypsum Company*, 438 U.S. 422, 462 (1978). A critical distinction exists, however, between the challenged instruction below and the one given in *Lowenfield*.[7] In *Lowenfield*, the trial court began its supplemental instruction by explaining, "As I instructed you earlier if the jury is unable to unanimously agree on a recommendation the Court shall impose the sentence of Life Imprisonment . . . ." *Id.* at 235. Thus, the jury in *Lowenfield*, unlike petitioner's jury, not only knew the effect of a deadlock but also realized *it was permissible* to fail to reach a unanimous sentencing recommendation. The trial court never told petitioner's jury it could fail to reach a unanimous sentencing recommendation, that the jury could "hang." Despite finding the supplemental instruction in Lowenfield not coercive, this Court recognized the potential problem. It limited the scope of *Lowenfield* as follows:

> By so holding we do not be understood as saying other combinations of supplemental charges and polling may not require a different conclusion. Any criminal defendant, and especially any capital defendant, being tried by a jury is entitled to the uncoerced verdict of that body.

Id. at 241. The court below rejected this argument on the merits. [App. 22] *Price*, 326 N.C. at 90-93, 388 S.E.2d at 103-05. The court essentially deferred to the trial court's discretion as to whether supplemental instructions were appropriate. *Id.* at 92-93, 388

[7] Furthermore, defense counsel in *Lowenfield* failed to object to the supplemental instruction, unlike the present case. *Lowenfield v. Phelps*, 484 U.S. 231, 240 (1988). This Court found "such an omission indicate[d] that the potential for coercion argued now was not apparent to one on the spot." *Id.* On the contrary, the "potential for coercion" was readily apparent to those "on the spot" in the present case.

S.E.2d at 105. It failed to explain how the potential coercion feared in *Lowenfield* evaporated. The present case graphically illustrates the potential prejudice on the question left open in *Lowenfield*.

Courts in a number of other jurisdictions have reached radically different results on facts almost identical to those at bar, creating a significant division among the highest courts of many jurisdictions on this issue. *See, e.g., State v. Williams*, 392 So.2d 619 (La. 1990); *Rose v. State*, 425 So.2d 521 (Fla), *cert. denied*, 461 U.S. 909 (1983); *Legare v. State*, 250 Ga. 875, 302 S.E.2d 351 (1983). In *Williams*, the jury returned to the courtroom after deliberating on punishment for approximately three hours. The jury foreman essentially asked the trial court if the jury's decision had to be unanimous, to which the trial court responded affirmatively. The jury asked to continue its deliberations and eventually recommended a sentence of death. 392 So.2d at 633. Noting that the trial court was obligated to inform the jury fully as to the consequences of their sentencing recommendation, the Louisiana court found reversible error. "Where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed so as to minimize the risk of arbitrary and capricious action." *Id.* Petitioner's jury, on the other hand, could only speculate as to the possible outcome in the event of non-unanimity. The jurors could rationally have surmised that a new sentencing hearing, or perhaps even a new trial, before a different jury might be required. The harm of such a misapprehension is obvious.

> Such a false impression reasonably may have swayed a juror to join the majority, rather than hold to his honest convictions, in order to avoid forcing the parties, witnesses and court officials to undergo additional proceedings. Consequently, by allowing the jurors to remain ignorant of the true consequence of their failure to decide unanimously upon a recommendation, the trial court failed to

> suitably direct and limit the jury's discretion so as to minimize the risk of arbitrary and capricious action.
>
> If only one of the twelve jurors was swayed by the failure to inform him fully of the consequence of his sentence recommendation, then, in the absence of that error, the death penalty would not have been imposed.

Id. at 634-35.

The Florida Supreme Court reached a similar result in *Rose*. The jury in that case deliberated for a period of time with respect to punishment and sent the trial court a note saying, "We are tied six to six, and no one will change their mind at the moment. Please instruct us." The trial court gave the jury an *Allen*-type charge[8] mirroring the instruction given below. 425 So.2d at 525. The trial court should have advised the jury of the absence of a necessity to have the majority recommend death or life in prison. "There was no reason to give the '*Allen* charge' during the penalty phase of the trial. *Id*; *accord Patten v. State*, 467 So.2d 975, 979-80 (Fla.) (vacating a death sentence where an *Allen* charge was given during the penalty phase of defendant's trial after the jury indicated it was deadlocked), *cert. denied*, 474 U.S. 876 (1985).

Legare involved the Georgia capital sentencing statute which, like that of North Carolina, *requires* the trial court to impose a life sentence if the jury cannot unanimously recommend a sentence of life or death.[9] The sentencing jury in *Legare* indicated to the trial court it was divided ten-to-two. The trial court then gave an *Allen*-type charge. 250 Ga. at 876, 302 S.E.2d at 352. The court found reversible error and awarded the defendant a new sentencing hearing. It explained "the [*Allen*] charge is simply not a correct statement of the law. If the jury is deadlocked, the trial judge must impose a life

[8] *See Allen v. United States*, 164 U.S. 492 (1896).

[9] O.C.G.A. §17-10-31; *see Hill v. State*, 250 Ga. 821, 301 S.E.2d 269 (1983); *Miller v. State*, 237 Ga. 557, 229 S.E.2d 376 (1976).

sentence." *Id.* at 877, 302 S.E.2d at 353.

The Delaware Supreme Court pointedly articulated the danger in such a supplemental instruction so graphically illustrated here as well as in *Williams*, *Rose*, and *Legare*. *E.g.*, *Rush v. State*, 491 A.2d 439 (Del. 1985). The *Rush* jury deliberated during the penalty phase for just over two hours. Upon its inability to give a penalty recommendation, the trial court gave an instruction similar to the one given below. In less than an hour, the jury returned a sentence of death. *Id.* at 450-52. In considering a challenge to the supplemental instruction, the Delaware court noted the reason for an *Allen*-type charge at the guilt phase of a trial. It is designed to obtain a verdict and avoid a retrial. *Id.* at 452. While it is still a delicate matter during the guilt phase, at the penalty stage, such an instruction is "overly coercive." *Id.* at 453. Under the law, no juror is obliged to rethink or reconsider his penalty determination once an announcement has been made that the jury is deadlocked. *Id.*

The deadlock in *Rush* is particularly compelling. When the jury returned to the courtroom, the foreman told the trial court some of the jurors could not "have their viewpoint changed under any circumstances. Therefore, we wish you to instruct us what we should do about the form." 491 A.2d at 453. The jury had effectively announced an ultimate decision of being deadlocked, much as petitioner's jury did in the present case. Upon this inquiry, the trial court erred in having the jury continued its deliberations. "Under the circumstances then existent in this case, no juror voting against the death penalty was obliged under the law to 'think it over.'" *Id.*[10]

[10] The New Jersey courts have reached similar results. *E.g.*, *State v. Ramseur*, 524 A.2d 188 (N.J. 1987). In that case, the jury had deliberated with respect to a possible capital sentence for over four hours. It then indicated to the trial court that it was hung. The trial court gave supplemental instructions similar to those given below but failed to "reinform the jury that in capital cases the law permits the issue of penalty to be finally resolved by a non-unanimous verdict, and that a non-unanimous verdict would result in a sentence of imprisonment." *Id.* at 280. The remarks given in *Ramseur*, like those given below, "could have been understood only to mean that by failing to reach unanimity, the jury was not properly performing its function." *Id.* at 282. In reaching this result, the New Jersey court rejected "the premise . . . that jurors will,

Although the decisions from other jurisdictions on this issue are not unanimous, *e.g., People v. Kimble*, 44 Cal. 3rd 4809, 244 Cal. Rptr. 148, 749 P.2d 803 (1988); *Romine v. State*, 256 Ga. 521, 250 S.E.2d 446 (1986), the weight of authority supports petitioner's position. The division among the states demonstrates, at the very least, the need for this Court's intervention in this important issue. The potentially coercive effect of an *Allen*-type charge in the sentencing phase of a capital case recognized in *Lowenfield* is a risk the Eighth Amendment will not permit. If a single juror agreed to the sentencing recommendation reached here because of the erroneous impression that unanimity was required, that juror was the difference between life and death for petitioner. In a case of jury deadlock, the exacting standard of reliability demanded in capital sentencing proceedings offsets any concern the state might have with juror abdication. Given the division of authority among the highest courts of a number of jurisdictions on this important issue to capital proceedings, review of this question is in order.

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if given the chance, take the easy way out and fail even to try to reach agreement" as to a sentencing recommendation.

> The process of death qualification, the jurors' oath, and the trial court's instructions are all designed to assure that the jury will make a conscientious attempt to follow the law in reaching its verdict. The entire system of capital punishment depends on the belief that a jury representing the conscience of the community will responsibly exercise its guided discretion in deciding who shall live and who shall die. To hide from the jury the full range of its sentencing options, thus permitting its decision to be based on uninformed and possible inaccurate speculation, is to mock the goals of rationality and consistency required by modern death penalty jurisprudence.

Id. Indeed, North Carolina's Chief Justice long ago reached a similar conclusion. "I believe the instruction would inform the jury that it cannot escape the task of recommending a sentence. Whatever it does some sentence will be imposed as a result." *State v. Johnson*, 298 N.C. 355, 378, 259 S.E.2d 752, 766 (1979) (Exum, J., dissenting). Unfortunately, the court below does not follow this advice.

III. WHETHER AN APPELLATE COURT MAY EVER DISREGARD AS HARMLESS ERROR A JURY INSTRUCTION ALREADY FOUND UNCONSTITUTIONAL BY THIS COURT, MCKOY v. NORTH CAROLINA, THAT IMPERMISSIBLY LIMITS THE ABILITIES OF INDIVIDUAL JURORS TO CONSIDER AND GIVE EFFECT TO MITIGATING EVIDENCE IN THE CAPITAL CASE, WHERE SUCH ERROR IS FUNDAMENTAL TO THE VALIDITY AND RELIABILITY OF THE CAPITAL SENTENCING PROCESS AND WHERE NO RELIABLE AND SATISFACTORY EXTRINSIC EVIDENCE SHOWS THE ERROR HARMLESS BEYOND A REASONABLE DOUBT.

Petitioner's jury received multiple admonitions it must agree unanimously that a given mitigating circumstance existed before any individual juror could consider the evidence in the sentencing decision. This instruction was unconstitutional. *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990). This Court remanded petitioner's case to the Supreme Court of North Carolina for reconsideration in light of *McKoy*. *Price v. North Carolina*, 494 U.S. ___, 112 L.Ed.2d 7 (1990). Relying on an oral poll of the jury by the trial court, the lower court concluded the *McKoy* error was harmless. [App. 32-35] *Price*, 331 N.C. at 623-28, 418 S.E.2d at 171-74. The court did not find, however, that petitioner's jury was not precluded from considering relevant mitigating evidence in the sentencing process. The lower court also did not find the error harmless due to the failure to present mitigating evidence or because of the relative weakness of the mitigating evidence affected by the unconstitutional instructions. See McNeil v. North Carolina, 494 U.S. 1050 (1990) (Kennedy, J., dissenting from the remand in light of McKoy). The interpretation given by the jurors in response to the poll in this case cannot be squared with how a reasonable juror might have understood the questions in the poll in light of all of the instructions given in this case. The lower court applied an incorrect harmless error analysis given the fundamental nature of the constitutional error in this capital case. Accordingly, review by certiorari is in order.

After its lengthy deliberations, the jury returned to the courtroom and announced it had reached a unanimous recommendation as to sentence. After

determining the jury had recommended a sentence of death, the trial court directed the clerk to poll jurors individually.[12] Upon petitioner's request, the polling process involved an inquiry as to each aggravating and mitigating circumstance. Contrary to the lower court's analysis, the poll does not conclusively show each juror personally rejected the unfound mitigating circumstances. The jury poll in no way demonstrates that the erroneous instructions did not preclude at least one juror from considering one or more of these mitigating circumstances not unanimously found when weighing all the circumstances in the ultimate sentencing decision, in violation of *McKoy*.

Analyzing the inadequacy of the jury poll to dispel the *McKoy* error begins with the trial court's charge to the jury. When he explained the second issue in the case, he told the jury:

> Issue Two is "Do you unanimously find from the evidence the existence of one or more of the following mitigating circumstances?"

[App. 62] He then proceeded to instruct the jury as to each of the ten mitigating factors, including the nine specific mitigating factors and the catch-all provision. At the conclusion of his instructions on each mitigating circumstance, he told the jury:

> If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, you will so indicate by having your foreman write no in that space.

[App. 65, 66-67, 68, 69, 70, 71-72, 73, 74, 75, 76] These instructions plainly told jurors that the answer to each, individual mitigating circumstance must be "No" if there was a lack of unanimity with respect to the particular circumstance. In other words, unless all twelve jurors agreed that a particular mitigating circumstance existed, the answer would

[12] In a capital case, the jury must be individually polled to establish each juror's agreement with the sentencing recommendation. N.C. Gen. Stat. §15A-2000(b).

be "No."

Immediately upon the jury's announcement that it had arrived at a sentencing recommendation, the trial court instructed the clerk to take the recommendation, which occurred as follows:

> THE CLERK: Ladies and gentlemen of the jury, have you agreed upon your recommendation? The recommendation that shows that:
>
> "Issue One: Do you unanimously find from the evidence beyond a reasonable doubt the existence of one or more of the following aggravating circumstances? Answer: Yes."
>
> As to the aggravating circumstances, "Number 1: Had the defendant been previously convicted of a felony involving the use of violence to the person; to-wit: the conviction of murder arising out of the death of Joan Brady which occurred October 18, 1984? Answer: Yes."
>
> "(2) Was this murder part of a course of conduct in which the defendant engaged and did that course of conduct include the commission by the defendant of other crimes of violence against Elaine Clay, Robbie Davis, James Hardy and Tony Gammon? Answer: Yes."
>
> "Issue Two: Do you unanimously find that the evidence of the existence of one or more of the following mitigating circumstances: Answer: Yes."
>
> As to the mitigating circumstances, "Number 1: This murder was committed while the defendant was under the influence of mental illness or emotional disturbance. Answer: No."
>
> "(2) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by low intelligence: Answer: No."

"(3) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by manic-depressive illness. Answer: No."

"(4) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by schizophrenic illness. Answer: No."

"(5) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by emotional instability. Answer: No."

"(6) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by drug use. Answer: No."

"(7) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by drug-induced mental illness. Answer: No."

"(8) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by mixed personality disorder. Answer: No."

"(9) The defendant's family has a history of mental illness or emotional disturbance. Answer: Yes."

"(10) Any other circumstance or circumstances arising from the evidence which you, the jury, deem to have mitigating value. Answer: No."

"Issue Three: Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you, is or are, insufficient to outweigh the aggravating circumstance or circumstances found by you? Answer: Yes."

"Issue Four: Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you? Answer: Yes."

The recommendation is "we, the jury, unanimously recommend that the defendant, Ricky Lee Price, be sentenced to death."

This is your recommendation, so say you all?

THE COURT: If this is your recommendation, so say you all, raise your right hand.

Let the record reflect that each and every juror has raised his or her right hand.

[App. 10?-??] As the record reflects, all twelve jurors raised their hands indicating assent to all of the answers on the Issues and Recommendation form, including the negative answers to nine of the ten mitigating circumstances. At this juncture, the trial court directed that the jury be polled individually. [App. 1??] The clerk proceeded to conduct this poll by reading each finding with the jury's answer and then seeking each individual juror's assent. [App. 1??-1??] For example, the clerk addressed the first juror as follows with respect to the first mitigating circumstance:

> As to the mitigating factors, "Number 1: This murder was committed while the defendant was under the influence of mental illness or emotional disturbances. Answer: No." Is that your answer?

[App. 1??] When the juror responded affirmatively, the clerk then asked him "do you still assent thereto?" [App. 1??]

A reasonable likelihood arose from these unconstitutional instructions that an individual juror would understand that *her* answer to a specific mitigating circumstance must be "No" *unless the entire jury agreed* that this mitigating circumstance was proved by a preponderance of the evidence. *See Boyde v. California*, 494 U.S. 370 (1990). In the context of the entire charge, a reasonable juror would be hard pressed to understand the challenged instructions to mean that a negative finding of a particular mitigating factor would not be *her* answer if the jury could not unanimously agree that the mitigating factor existed. "Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the way lawyers might. [A] common sense understanding of the instructions in light of all that has taken place at the trial is likely to prevail over technical hairsplitting." *Id.* at 329. This "common sense" understanding is particularly appropriate in this case where an individual juror was responding to a question without opportunity for deliberation or discussion with respect to its meaning.

The trial court instructed the sentencing jury on at least ten occasions that it *must* answer "No" to a mitigating circumstance if the jury did not agree unanimously as to its existence. There was no suggestion that any individual juror could have a different ultimate answer to a particular mitigating circumstance than the answer of the jury. There could be only one answer for the entire jury. A reasonable juror would have understood this instruction to mean that the jury's negative answer and, hence, her negative answer to any particular circumstance depended on the absence of a unanimous agreement that the circumstance had been proved by a preponderance of the evidence. If a juror so understood the instructions, then *her individual* answer to a mitigating circumstance would be "No" if the jury failed to agree unanimously as to the existence of this circumstance. Under these conditions, an individual juror's assent to the "No" answer during the poll would simply indicate her agreement that the jury failed to find this circumstance unanimously, not that *she* would have failed to find it if she

were free under the trial court's instructions to make her own individual determination.

Quite simply, a reasonable juror would have understood the poll to query whether the answers on the issue sheet were the jury's answers. The question asked if a particular answer was "your answer." At each point in the trial when the judge used the word "you" or "your," he referred to the entire jury not individual jurors. The jury was impaneled with this pronoun collectively; the trial court addressed the jury collectively with this pronoun; and he used the pronoun collectively to frame all of the sentencing issues. Each juror would have understood this question to address whether the answer to a given mitigating factor was *the jury's* answer. An individual's assent to any answer on the issue sheet meant no more than she agreed that the answer was that of the jury.

The Supreme Court of North Carolina, on remand from this Court in light of *McKoy*, found the constitutional error under *McKoy* in this case harmless solely because of this polling process. [App. 34] *Price*, 331 N.C. at 628, 418 S.E.2d at 173. It did not find the absence of evidence to support the numerous mitigating factors submitted to but not found unanimously by petitioner's sentencing jury.[13] Without referring to *Boyde*, the lower court concluded:

> A reasonable juror would understand that if she were being questioned individually, the question was referring to her as an individual juror. The very purpose of the poll is to ascertain each juror's individual vote on the issue or issues in question. We are confident the jurors her did not understand it to be otherwise.

[App. 34] *Price*, 331 N.C. at 627-28, 418 S.E.2d at 173. The decision fails to come to grips with the reasonableness of a contrary interpretation by one, *individual* juror given the thorough indoctrination through all of the instructions in this case that each juror

[13] Indeed, the court said there was evidence to support several of the mitigating circumstances not found by the jury. [App. 33] *Price*, 331 N.C. at 628, 418 S.E.2d at 173.

must answer any mitigating circumstance "No" if the entire jury does not unanimously find the circumstance to exist.

A reasonable juror would have understood the instructions to mean that the only appropriate answer to a mitigating factor was "No" if the jury failed to find it unanimously. When that juror then responded affirmatively to the above polling inquiry, she may reasonably be saying: "Yes. The jury has failed to agree unanimously as to the existence of this mitigating factor. I assent to the "No" answer because we were unable to agree unanimously that this mitigating fctor existed." Under such an interpretation, the polling process does not prove the absence of *McKoy* error or that any such error was harmless. Contrary to the lower court's analysis, the present record does not show conclusively that each of petitioner's jurors rejected any one much less all of the nine unfound mitigating factors.

This Court has had occasion many times in the past to answer questions about the jury's deliberations in the sentencing phase of a capital case so that, among other things, the structure of capital sentencing hearings would permit full consideration of mitigating evidence and so that the actors in the system - be they jurors or judges - would be free to play the roles they have been assigned in such hearings. The Eighth and Fourteenth Amendments require no less. As this case demonstrates, there are still more questions to be answered.

The members of the jury in this case were unconstitutionally instructed that they could not consider and give effect to whatever evidence they deemed to have mitigating value unless all of the jurors agreed that such evidence had mitigating value. The state appellate court then found that this error was harmless based on a misreading of the results of a jury poll. No one ever heard from the individual jurors in this case an answer to the question of how they would have voted - life or death - if they had been allowed to do what the Constitution requires that they are free to do, i.e., to consider mitigating circumstances that fewer than all of the jurors thought had been established by a preponderance of the evidence.

The flaw of the unanimity rule, as found by this Court in McKoy, is the deprivation of a defendant's right to have each juror, individually, weigh such mitigating circumstances as he or she deems established against such aggravating circumstances as are proved by the state, and then vote individually on life or death. This flaw was not avoided for the Petitioner by a mere polling to ascertain whether the foreman reported correctly on unanimity, for it is the unanimity requirement itself that is the flaw. This Petitioner, no less than petitioner McKoy, is entitled to a new penalty trial.

In Clemons v. Mississippi, 494 U.S. 738 (1990), this Court held that it was constitutionally permissible for state appellate courts to engage in harmless error analysis in an effort to determine "whether beyond a reasonable doubt the result would have been the same" if a particular aggravating circumstance had not been erroneously defined in the jury instructions.

Citing Clemons, and without further analysis, the North Carolina Supreme Court held in McKoy, 394 S.E.2d at 433, that harmless error analysis was equally applicable to improper jury instructions in the sentencing phase of a capital case that restrict the ability of individual jurors to consider and give effect to mitigating evidence. This Court should decide whether such a broad reading of Clemons is appropriate when the constitutional defect at issue encroaches upon the jury's

consideration of mitigating evidence, a "constitutionally indispensable part of the process of inflicting the penalty of death." Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion).

As the North Carolina Supreme Court itself acknowledged, it would be a "rare case" where McKoy error would be harmless. McKoy, 394 S.E.2d at 433 & n.4. Indeed, the instant case demonstrates the need for a clear rule in cases where there is no record evidence of what the individual jurors had decided, lest appellate courts engage in manipulation of the record to "bootstrap" their way to an affirmation of a death sentence. The requirement that the jury in a capital case be given an unfettered opportunity to weigh mitigating evidence in deciding whether to impose the death penalty is one of those constitutional guarantees that "is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising form its denial," Chapman v. California, 386 U.S. 18, 43 (1967) (Stewart, J. concurring) (quoting Glasser v. United States, 315 U.S. 60, 76 (1942)).

Certain constitutional violations "by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless." Satterwhite v. Texas, 486 U.S. 249, 256 (1988), accord Chapman, 386 U.S. at 23 & n.8 (citing Gideon v. Wainright, 372 U.S. 335 (1963) (denial of right to counsel); Tumey v. Ohio, 273 U.S. 510 (1927) (biased tribunal)). Where a

constitutional violation is not simply a "trial error," the effect of which can be quantitatively assessed, but instead is a defect that alters "the framework within which the trial proceeds," the violation "def[ies] analysis by 'harmless-error' standards" and requires that the judgment be reversed. Arizona v. Fulminante, 111 S.Ct. 1246, 1265 (1991).

The Eighth Amendment requires an individualized assessment of whether death is an appropriate punishment. Zant v. Stephens, 462 U.S. 862, 879 (1983). To comply with this requirement, "the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense." McKoy, 494 U.S. at 443 (quoting Penry v. Lynaugh, 492 U.S. 302, 327-28 (1989)).

Constitutional violations that prevent full participation by individual jurors in deliberations about the death penalty are more than mere trial errors - they necessarily affect the framework within which a capital sentencing hearing proceeds. For example, in Gray v. Mississippi, 481 U.S. 648 (1987), this Court held that the erroneous exclusion of a single venire member due to his or her views on capital punishment could *never be considered harmless*. Id. at 668 (emphasis added). This Court also has reversed convictions without engaging in harmless error analysis when constitutionally defective jury instructions affect the functioning as opposed to the composition of a jury. See Jackson v. Virginia, 443 U.S. 307,

320 n.14 (1979) ("[F]ailure to instruct a jury on the necessity of proof of guilt beyond a reasonable doubt can never be harmless error") (citing Cool v. United States, 409 U.S. 100 (1972); Cf. Taylor v. Kentucky, 436 U.S. 478 (1978)).

These principles are especially important where "there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences." Caldwell v. Mississippi, 472 U.S. 320, 330 (1985), see Luginbuhl, Comprehension of Judges' Instructions in the Penalty Phase of a Capital Trial: Focus on Mitigating Circumstances, 16 Law & Hum. Behav. 203, 214-15 (1992) (improper unanimity instruction effectively prevents consideration of mitigating circumstance "by a juror who thought that it existed by a preponderance of the evidence.") Such a bias against consideration of mitigating evidence was the very reason this Court voided the unanimity instruction given in the sentencing phase of petitioner's trial, see McKoy, 494 U.S. at 439-40, and it is simply impossible now to determine what effect that bias had on the jury's deliberations in this case. "[T]he evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer." Satterwhite, 486 U.S. at 258.

The decision in Clemons is not to the contrary. In that case, this Court found that a constitutionally defective instruction concerning one of three aggravating circumstances found by the jury might constitute harmless error if it were

possible to determine beyond a reasonable doubt that "the result would have been the same" had that aggravating circumstance been properly defined in the jury instructions. Clemons, 494 U.S. at 754. This case related solely to definition of the "heinous, atrocious and cruel" aggravating circumstance and had nothing to do with the way in which the jury was to approach their deliberations on mitigation. See Pensinger v. California, 112 S.Ct. 351 (1991) (noting that the jury instruction in Clemons "did not alter the mix of evidence weighed by the jury at the penalty phase.")

It is one thing to decide that invalidation of one of three aggravating circumstances found by the jury constitutes harmless error, although this Court refused to accept that conclusion on the record before it in Clemons. It is quite another to announce that McKoy error had no effect on the decision-making processes of the twelve persons in the jury room, a question on which there is not and cannot be any record evidence.

This Court has been presented with this question in a previous request to review a decision of the Supreme Court of North Carolina. Although review was denied, three justices dissented and would have vacated the judgment in that case. Allen v. North Carolina, 113 S.Ct. 1402, 1403 (1993)(Justices Blackmun, O'Connor, and Souter would grant the petition and reverse the judgment). The identical polling process relied upon below to find McKoy error harmless had been used in Allen. Review of this harmless error analysis is in order now.

IV. THE LOWER COURT APPLIED AN IMPROPER HARMLESS ERROR ANALYSIS TO THE UNCONSTITUTIONAL JURY SELECTION PROCESS THAT VIOLATED MORGAN v. ILLINOIS WHEN IT RELIED ON INQUIRIES OF PROSPECTIVE JURORS THAT WERE IDENTICAL TO THOSE INQUIRIES FOUND TO BE CONSTITUTIONALLY DEFICIENT IN MORGAN ITSELF, IN VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHTS TO A FAIR AND IMPARTIAL JURY.

During the early stages of the jury selection proceedings, petitioner attempted to question a prospective juror regarding whether he would require the prosecution to prove one or more aggravating circumstances before he would return a death sentence. The trial court sustained the prosecutor's objection to this question and precluded this line of inquiry. [App. 84-86] Petitioner desired to question all prospective jurors in this manner and the trial court so noted for the record. The Sixth Amendment endows petitioner with the guarantee of an impartial jury in accordance with rudimentary due process. *Ristaino v. Ross*, 424 U.S. 589, 595 n.6 (1976). As a corollary matter, the Fourteenth Amendment entitles petitioner the opportunity to take reasonable steps through the jury selection process to ensure juror impartiality with respect to the imposition of a death sentence. *Morgan v. Illinois*, 504 U.S. ___, 119 L.Ed.2d 492, 502-07 (1992). Petitioner's challenges to potential jurors may well be the most important devices designed to ferret out latent prejudices in potential jurors. *See Pointer v. United States*, 151 U.S. 396 (1894). The undue restrictions imposed upon his voir dire of potential jurors were particularly egregious since they prevented him from ascertaining whether prospective jurors would be fair and impartial in deciding whether to impose a sentence of life or death.

Morgan itself rejected the notion that asking if prospective jurors could "follow the law" satisfied the right to ask if they could consider a life sentence. Yet the lower court used this inquiry to find the admitted error harmless.[11]

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[11]The intervening decision in Brecht v. Abrahamson sheds new light on the need for state appellate courts to rigorously engage in harmless error analysis before denying relief. This Court This case could be remanded in light of Brecht.

David M. Kimbrough was one of the twelve prospective jurors passed to petitioner by the prosecution. Near the beginning of his questioning of Kimbrough, petitioner asked whether Kimbrough thought it should be necessary for the state to prove aggravating circumstances in addition to proving premeditated and deliberate murder before he would impose a sentence of death. The prosecutor's objection to this question was sustained. Petitioner rephrased his inquiry, which was also precluded by the trial court. The questions were designed to determine if the prospective juror had prejudices or attitudes, latent or otherwise, that might influence his ability fairly and impartially to consider both life and death as possible sentences in a capital case. Whether he thought the state should be required to prove aggravation *in addition* to proving a first degree murder in order to obtain a sentence of death strikes at the heart of his ability to be fair and impartial.

The following colloquy occurred during petitioner's questioning of this prospective juror:

> [DEFENSE COUNSEL]: Do you have any preference at that point, nothing else appearing, do you feel that a person who is guilty of first degree murder, premeditated mruder, do you feel that nothing else appearing that the death penalty is the appropriate punishment?
>
> [PROSPECTIVE JUROR]: It would depend --

> [PROSECUTOR]: Objection.
>
> THE COURT: Sustained.
>
> [DEFENSE COUNSEL]: May I approach the bench?
>
> THE COURT: Yes, sir.
>
> [UNRECORDED SIDE-BAR.]
>
> [DEFENSE COUNSEL]: Mr. Kimbrough, if the State were to satisfy you and the jury beyond a reasonable doubt that Ricky Price was guilty of first degree murder, would you then be comfortable in requiring the State to show additional aggravating factors according to the Judge's instructions?
>
> [PROSPECTIVE JUROR]: According to the Judge's instructions, yes.
>
> [DEFENSE COUNSEL]: Okay. Do you feel that it should be necessary for the State to show additional aggravating factors before you would vote to impose the death penalty?
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Sustained.
>
> [DEFENSE COUNSEL]: Mr. Kimbrough, asking you this not to know whether you would follow the Judge's instructions, but to know in the predisposition of your mind, I'll ask you do you feel that the State should be required to show you additional aggravating factors before you would vote to impose the death penalty?
>
> [PROSECUTOR]: Objection.

THE COURT: Sustained.

[DEFENSE COUNSEL]: For the record, I would except and would note that I would propose to ask the same question to all twelve jurors. And in the interest of time if the Court would note that.

THE COURT: Let the record so reflect.

[App. 84-85] Petitioner plainly sought to inquire whether prospective jurors would require the prosecution to do more than prove his guilt of first degree murder before being willing to return a sentence of death. He desired to have more than a general willingness to follow the law and the trial court's instructions regarding aggravating and mitigating factors. Under *Morgan*, he was entitled to this further inquiry.

> As to general questions of fairness and impartiality, such jurors could in all truth and candor respond affirmatively, personally confident that such dogmatic views are fair and impartial, while leaving the specific concern unprobed.

Morgan, 119 L.Ed.2d at 506. Petitioner's jurors, like this one, might well feel confident in their ability to consider only aggravating factors under the trial court's instructions despite latent dogmatic beliefs that a premeditated and deliberate murder, standing alone, is sufficiently aggravated to justify a sentence of death.

The North Carolina Supreme Court, admittedly without the benefit of *Morgan*, rejected this claim on the merits. Construing petitioner's questions as an effort to gauge prospective jurors' approval or comprehension of the law, it found no abuse of discretion.

> Although it is proper under appropriate circumstances to inquire of jurors whether they can follow the law as charged by the court, *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 65 L.Ed.2d 581, 589 (1980), it is neither analogous nor proper to ask questions designed to gauge jurors' approval or to test their comprehension of the law. Moreover, while counsel may inquire diligently into a juror's fitness to serve, the extent and manner of that inquiry rests within the sound discretion of the trial court. *State v. Parks*, 324 N.C. 420, 423, 378 S.E.2d 785, 787 (1989). Defendant has failed to show either a clear abuse of discretion on the part of the trial court or resulting prejudice.

[App. 6] *Price*, 326 N.C. at 66-67, 388 S.E.2d at 89.

Morgan dispells two important misapprehensions in this analysis. First, due process entitles petitioner to make inquiries of a prospective capital juror beyond his naked assertion that he can follow the law. Petitioner may, therefore, "gauge" the juror's disposition toward the law. *Morgan*, 119 L.Ed.2d at 502-06. Second, the limitations on voir dire may not be delegated to the trial court's discretion. Where constitutional rights are at issue, appellate review must be readily available. *Id.* at 503.

The lower court, on remand, found Morgan error in petitioner's capotal trial. State v. Price, 334 N.C. 615, 617-18, 433 S.E.2d 746, 747-48 (1993). It found the error harmless, however, because

> [t]he trial court instructed the potential as to the method of finding aggravating and mitigating circumstances and the consequences of doing so. The defendant was then allowed to question the jurors as to their ability to follow the court's instruction in regard to these circumstances and apply the law according to the instructions. This should have enabled defendant to determine whether to challenge a juror on the ground he would automatically vote for the death penalty if the defendant was found guilty.

Id. at 618, 433 S.E.2d at 748 (emphasis added). The sort of harmless error analysis is woefully flawed.

Morgan itself found such questioning insufficient to cure the constitutional error. Inquiries about the general fairness of prospective jurors "and 'follow the law' questions" are insufficient because "such jurors could in all truth and candor respond affirmatively, personally confident that [their] dogmatic views are fair and impartial, while leaving the specific concern [of the ability to consider a life sentence after finding petitioner guilty of first degree murder] unprobed." Morgan, 119 L.Ed2d at 506.

At its essence, Morgan error is simply one of those rare types of federal constitutional violations that cannot be deemed harmless beyond a reasonable doubt. E.g., Gray v. Mississippi, 481 U.S. 648 (1987)(exclusion of veniremember improperly due to views about capital punishment never harmless). It is impossible to ascertain the effect, or lack thereof, from the improper seating of a veniremember.

Petitioner suffered from having several veniremembers seated without as adequate opportunity to ascertain their abilities to consider a life sentence once they found him guilty of first degree murder and found the existence of an aggravating circumstance. Until that point, he would not be eligible for a snetence of death in North Carolina. The lower court's harmless error analysis simply does not comport with basic constitutional requirements, particularly in light of the more lenient harmless error standard now applicable in federal habeas corpus. Review of this issue is warranted.

V. THE PROSECUTOR'S USE OF PETITIONER'S PURPORTED ABSENCE OF REMORSE AT TRIAL, ARISING SOLELY FROM HIS UNWILLINGNESS TO ADMIT GUILT TO THE JURY, RENDERED THE DEATH SENTENCE UNRELIABLE UNDER THE EIGHTH AMENDMENT.

During his closing argument, the prosecutor stressed petitioner's purported absence of remorse at trial, long after the crime itself had been perpetrated. [App. 99-100] The basis underlying this contention was petitioner's unwillingness to admit guilt before the jury in the courtroom. Stated another way, it was his plea of not guilty, refusal to incriminate himself, and insistence on his constitutional right to trial by jury with a presumption of innocence to which this argument was directed. Prosecutorial comment on his failure to express remorse and thereby admit guilt violated his right to freedom from self-incrimination. *See Griffin v. California*, 380 U.S. 609 (1965). Where a defendant's own actions or words outside the courthouse reflect remorselessness, such evidence in some circumstances might be relevant to punishment. Similarly, if a defendant advances remorse in mitigation, he might open the door to rebuttal by the state. To exploit at sentencing petitioner's failure to express remorse at trial by virtue of his unwillingness to admit guilt, however, contravenes fundamental constitutional protections, such as freedom from self-incrimination and due process of law, and risks an unreliable death sentence under the Eighth Amendment. A significant division of authority exists among the jurisdictions on this important issue, requiring resolution by this Court. *See, e.g., Lesko v. Lehman*, 925 F.2d 1527 (3d Cir.), *cert. denied*, 116 L.Ed.2d

226 (1991).

The Court below rejected this argument, saying simply these remarks referred only to petitioner's demeanor in the courtroom. [App. 16] *Price*, 326 N.C. at 85, 388 S.E.2d at 100. A majority of the court had reached a similar conclusion, holding that such an argument does not unconstitutionally exploit defendant's unwillingness to admit guilt. *State v. Artis*, 325 N.C. 278, 327-28, 384 S.E.2d 470 (1989), *vacated and remanded on other grounds*, 494 U.S. 1023 (1990). Chief Justice Exum dissented in *Artis* and took the majority to task for ignoring the due process implications of this argument. The majority ignored, he said, how "such argument impermissibly compromises [petitioner's] right to plead not guilty and to stand by his plea throughout the proceedings and, thereby, denies him due process. *Id.* at 350, 384 S.E.2d at 512 (Exum, C.J., dissenting). As Chief Justice Exum also noted, the majority's reasoning is wholly at odds with other jurisdictions which have considered this important constitutional issue. *Id.*

Petitioner has a constitutional right to trial by jury upon a plea of not guilty and stand by that plea throughout the proceedings. He has a concomitant constitutional right to testify in support of that plea and to stand by that testimony throughout the proceedings. *See Owen v. State*, 656 S.W.2d 458 (Tex. Crim. App. 1983) (en banc). To permit the state to assert his failure to express remorse "would place an accused in the paradoxical position of saying I am sorry for a crime of which I am not guilty" and nevertheless seek leniency at sentencing. *Id.* at 459; *accord Dickinson v. State*, 685 S.W.2d 320 (Tex. Crim. App. 1984).

The analysis in *Owen* is persuasive. Although a non-capital case, it featured a separate sentencing phrase before the jury. The defendant pled not guilty and, during the guilt phrase, testified that he acted in self-defense. At sentencing, he did not testify but nonetheless sought a lenient sentence. In arguing to the jury at sentencing, the

prosecutor twice contended that the defendant failed to show remorse and thus had not demonstrated a potential for rehabilitating. The court found the argument improperly penalized the defendant's exercise of his right to plead not guilty and to put the state to its proof. Even though the trial judge *sustained* the defendant's objections, the court held a mistrial should have been granted due to the grave potential for prejudice.

Similar reasoning led the Florida Supreme Court to preclude using a defendant's failure to express remorse at trial against him at a capital sentencing hearing. "To equate a defendant's not-guilty pleas with lack of remorse which may be considered in weighing an aggravating circumstance in support of imposition of the death penalty would in effect punish the defendant for exercising rights of due process." *Pope v. State*, 441 So.2d 1073, 1077 (Fla. 1983); *accord Trawick v. State*, 473 So.2d 1235 (Fla. 1985). The South Carolina Supreme Court also found such an argument improper. *State v. Sloan*, 298 S.E.2d 92, 95 (S.C. 1982) (finding reversible error where prosecutor briefly argued capital defendant pled not guilty and therefore lacked remorse, saying, "Has anyone said to you he's sorry, sorry for what he did? . . . What have you been told up until you found him guilty. He has pled not guilty.").

California has reacted similarly to its sister states. *People v. Coleman*, 459 P.2d 248 (Cal. 1969). In *Coleman*, the defendant testified and denied participation in the homicide. At the penalty phase arguments, the prosecutor criticized his failure to admit guilt and show remorse, much like the argument *sub judice*. The California Supreme Court soundly condemned this type of argument.

> A defendant would be placed in an intolerable dilemnma if his failure to confess following conviction could be urged at the trial on the issue of penalty as evidence of lack of remorse. To silence such argument, a defendant who had denied his guilt at the trial on the issue of guilt would have to admit or commit perjury at the trial on the issue of penalty.

> and he could do neither without in effect forfeiting his right to urge the trial court on motion for a new trial to reweigh the evidence on the issue of guilt. We conclude that any argument that failure to confess should be deemed evidence of lack of remorse is not permissible.

Id. The prosecutorial argument in petitioner's situation is virtually indistinguishable from its counterpart in *Coleman*.

Most recently, the Third Circuit joined these courts in *Lesko*. There, the prosecutor belittled Lesko's offer of mitigating testimony "without even having the 'common decency to say I'm sorry for what I did.'" 925 F.2d at 1544. Petitioner made a similar offer here. As the Third Circuit explained,

> To the jury, the natural and necessary interpretation of these comments would be that Lesko had a moral or legal obligation to address the charges against him -- indeed, to apologize for his crimes -- during his penalty phase testimony, and that the jury could and should punish him for his failure to do so.

Id. This "criticism of Lesko's failure to express remorse penalized the assertion of his fifth amendment privilege against self-incrimination . . . ." *Id.* at 1545.

Against this compelling legal backdrop, the prosecutor's actions at petitioner's sentencing hearing, uncorrected by the trial court, fundamentally infected the proceedings in a manner that unconstitutionally eroded the reliability of the proceedings and the resulting sentence of death. Although brief, their effect was extremely prejudicial.

> I talked with you in opening statement about a picture of a scene, picture of a scene of finding a boy, a young boy. Talked with you in closing argument to picture a scene of the defendant holding a knife to the throat of his uncle. I ask you now, my final speech to you, to picture a scene of a young boy awoke at night by his mother, nine-years old, "Robbie, our house is on fire. We've got to get of the house." Nine year old Robbin Davis in his pajamas and his mother in her pajamas on the same day that Brenda Smith laid strangled to death, had to flee from their homes [sic] and when the firemen arrived, but for the smoke detector, you would have seen volunteer firemen of the Pelham Fire Department, big strong men, crying over the death of the lifeless form of a small nine-year old child burned to death by this defendant who doesn't care.
>
> He shows no remorse. He gives no confession. He asks no repentance. He is a stone-cold killer.

[App. 9[illegible]] The reference here characterized petitioner as unremorseful because of his denial of guilt. It could be based on little else. He had, in fact, "confessed" as evidenced by the state's numerous witnesses relating various inculpatory statements. He simply had not "confessed" to the jury.

This argument encouraged the jury to aggravate petitioner's crime by considering his lack of remorse. In North Carolina, the jury may not do so as the capital sentencing scheme's enumeration of aggravating factors is all-inclusive and remorselessness is absent. *See* N.C. Gen. Stat. §15A-2000(e). The prosecutor here vigorously cross-examined petitioner at great length. A large portion of this inquiry centered on whether petitioner committed the crime. The prosecutor's argument could only have suggested to the jury that, based upon his plea of not guilty and evidence in support of that plea, petitioner showed no remorse.

Nothing meritorious can be said for the prosecutor's repeated exploitation on cross-examination and in argument to the jury of petitioner's refusal to admit guilt. It unfairly penalized his exercise of due process rights, as well as the right against self-incrimination, and deeply infected the sentencing determination. It was far more vigorous and detailed than the arguments held incurably prejudicial by the highest

courts of four different states in *Owen*, *Pope*, *Sloan*, and *Coleman*, as well as the Third Circuit in *Lesko*.

This important issue is likely to recur in capital proceedings because of the need for a separate sentencing hearing, often conducted before the same jury that determined guilt. A division exists among the jurisdictions on this question, making it appropriate for this Court's review. A grant of certiorari is in order.

CONCLUSION

For the independent reasons stated herein, petitioner respectfully requests that a Writ of Certiorari issue to review the judgment of the Supreme Court of North Carolina.

This the 29th day of December, 1993.

Respectfully submitted,

Gordon Widenhouse
Assistant Appellate Defender
Office of the Appellate Defender
1905 Meredith Drive, Suite 200
Durham North Carolina 27713
(919) 560-3282

IN THE SUPREME COURT OF NORTH CAROLINA

No. 587A87# Person County

STATE OF NORTH CAROLINA

v

RICKY LEE PRICE

Death Case

JUDGMENT

This cause came on to be argued upon remand by the United States Supreme Court for further consideration in light of Morgan v. Illinois, 501 U.S. ___ (1992).

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable John Webb, Associate Justice, be certified to the said Superior Court, Person County to the intent that the death sentence is affirmed; the mandate is reinstated and the case is remanded for the causes indicated in said opinion.

And it is considered and adjudged further, that the Defendant do pay the costs of the appeal in this Court incurred, to wit, the sum of Fifty-four and 60/100 dollars ($54.60), and execution issue therefor.

Certified to the Superior Court, Person County, this 30th day of September, 1993.

A TRUE COPY

CHRISTIE SPEIR CAMERON
Clerk of the Supreme Court

By: Peggy R. Byrd
Assistant Clerk

A TRUE COPY
CLERK OF THE SUPREME COURT
By Peggy R. Byrd
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App. 42

[3] Defendant lastly argues that the trial court erred by refusing to rule on defendant's motions for appropriate relief and for mistrial and dismissal prior to sentencing. Defendant contends that the trial court was required to rule on such motions prior to sentencing under N.C.G.S. § 15A-1061. The ruling, defendant argues, would have allowed defendant to decide whether to take the stand during the sentencing phase of his trial. We reject this assignment of error because defendant was not prejudiced by the trial court's failure to rule on defendant's motions prior to sentencing.

Defendant was tried capitally. After the sentencing proceeding, the jury recommended that defendant be sentenced to life imprisonment. Life imprisonment is the least severe sentence that defendant could have received for his conviction of first-degree murder. N.C.G.S. § 14-17 (Supp. 1992). Therefore, defendant's sentence could not have been reduced even if defendant had chosen to testify on his own behalf at the sentencing phase of his trial. Assuming, *arguendo*, that the trial court erred in delaying its ruling until after the sentencing proceeding, such error was not prejudicial to defendant. N.C.G.S. § 15A-1443 (1988).

We conclude defendant received a fair trial, free from prejudicial error.

NO ERROR.

STATE of North Carolina

v.

Ricky Lee PRICE.

No. 585A87.

Supreme Court of North Carolina.

Sept. 10, 1993.

Defendant was convicted before the Superior Court, Person County, Robert H. Hobgood, J., of first-degree murder and sentenced to death. On his appeal, the Supreme Court, 326 N.C. 56, 388 S.E.2d 84, affirmed. On petition for writ of certiorari, the United States Supreme Court, 498 U.S. 802, 111 S.Ct. 29, 112 L.Ed.2d 7, vacated and remanded. On remand, the Supreme Court, 331 N.C. 620, 418 S.E.2d 169, reaffirmed conviction and judgment. The United States Supreme Court again vacated and remanded, 113 S.Ct. 955. On remand, the Supreme Court, Webb, J., held that assuming it was error not to allow defense counsel to ask prospective jurors whether they would require state to prove aggravating circumstances before imposing the death penalty, error was harmless beyond a reasonable doubt, where defense counsel was allowed to ask other questions which should have enabled him to determine whether to challenge juror on ground juror would automatically vote for death penalty if defendant was found guilty.

Death sentence affirmed; mandate reinstated; remanded.

Criminal Law ⇐1166.16

Assuming it was error not to allow defense counsel on voir dire in capital case to ask prospective jurors whether they would require the state to prove aggravating circumstances before imposing the death penalty, it was harmless beyond a reasonable doubt, notwithstanding defendant's claim that he was thereby denied opportunity to determine whether jurors should be challenged because they would not require the state to prove such circumstances; defense counsel was allowed to ask other questions which should have enabled him to determine whether to challenge juror on ground that juror would automatically vote for death penalty if defendant was found guilty.

The defendant was convicted of first degree murder and sentenced to death. This Court affirmed his murder conviction and death sentence. The United States Su-

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WEBB, J

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preme Court vacated the judgment and remanded the case to us for further proceedings in light of *McKoy v. North Carolina*, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990). *State v. Price*, 326 N.C. 56, 388 S.E.2d 84, *vacated and remanded*, 498 U.S. 802, 111 S.Ct. 29, 112 L.Ed.2d 7 (1990) (*Price I*). This Court reaffirmed the conviction and judgment. The United States Supreme Court again vacated the judgment and remanded the case to us for further proceedings in light of *Morgan v. Illinois*, 504 U.S. —, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992). *State v. Price*, 331 N.C. 620, 418 S.E.2d 169 (1992), *vacated and remanded*, — U.S. —, 113 S.Ct. 955, 122 L.Ed.2d 113 (1993) (*Price II*).

The facts of this case are summarized in *Price I* and will not be restated here except as is necessary for proper treatment of the issue to be addressed.

Michael F. Easley, Atty. Gen. by Barry S. McNeill, Sp. Deputy Atty. Gen., Raleigh, for the State.

Malcolm R. Hunter, Jr., Appellate Defender by Gordon Widenhouse, Asst. Appellate Defender, Raleigh, for defendant-appellant.

WEBB, Justice.

This case has been remanded to us by the United States Supreme Court for further consideration in light of *Morgan v. Illinois*, 504 U.S. —, 112 S.Ct. 2222, 119 L.Ed.2d 492. In *Morgan*, the United States Supreme Court granted the defendant a new sentencing hearing because the trial court, during jury selection, would not ask the prospective jurors if they would "automatically vote to impose the death penalty no matter what the facts are[.]" *Id.* at —, 112 S.Ct. at 2226, 119 L.Ed.2d at 499. The United States Supreme Court said that the due process clause of the Fourteenth Amendment required that the defendant be allowed to have this question put to the jury in order to determine whether to exercise a challenge to any juror who answered in the affirmative. The Court said that general questions as to whether the jury "would follow the law" are not sufficient to satisfy the requirement that the defendant be allowed to make a sufficient inquiry to make an intelligent challenge.

The defendant says the rule of *Morgan* was violated by rulings of the court in this case as shown by the following colloquy:

MR. GALLOWAY: Mr. Kimbrough, if the State were to satisfy you and the jury beyond a reasonable doubt that Ricky Price was guilty of first degree murder, would you then be comfortable in requiring the State to show additional aggravating factors according to the Judge's instructions?

MR. KIMBROUGH: According to the Judge's instructions, yes.

MR. GALLOWAY: Okay. Do you feel that it should be necessary for the State to show additional aggravating factors before you would vote to impose the death penalty?

MR. BREWER: Objection.

THE COURT: Sustained.

MR. GALLOWAY: Mr. Kimbrough, asking you this not to know whether you would follow the Judge's instructions, but to know in the predisposition of your mind, I'll ask you do you feel that the State should be required to show you additional aggravating factors before you would vote to impose the death penalty?

MR. BREWER: Objection.

THE COURT: Sustained.

MR. GALLOWAY: For the record, I would except and would note that I would propose to ask the same question to all twelve jurors. And in the interest of time if the Court would note that.

THE COURT: Let the record so reflect.

The defendant says that this colloquy illustrates that he was denied the opportunity to exercise his right to ask a specific question of prospective jurors in order to determine whom he should challenge because they might not be able to require the State to prove aggravating circumstances before imposing the death penalty.

Assuming it was error not to allow the questions shown above, we do not believe it was prejudicial to the defendant. He was

allowed to ask other questions which should have enabled him to determine if challenges should have been made on this ground. The court instructed the potential jurors as to the method of finding aggravating and mitigating circumstances and the consequences of doing so. The defendant was then allowed to question the jurors as to their ability to follow the court's instruction in regard to these circumstances and apply the law according to the instructions. This should have enabled the defendant to determine whether to challenge a juror on the ground he would automatically vote for the death penalty if the defendant was found guilty.

If the refusal to allow the excluded questions was error, it was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988). The case is remanded to the Superior Court, Person County, for further proceedings.

DEATH SENTENCE AFFIRMED; MANDATE REINSTATED; CASE REMANDED.

STATE of North Carolina

v.

Robert Archie CLEMMONS, Jr.

No. 9218SC78.

Court of Appeals of North Carolina.

Aug. 17, 1993.

Defendant was convicted in the Superior Court, Guilford County, W. Russell Duke, Jr., J., of obtaining property by false pretenses and transacting business in securities without being licensed or registered in violation of North Carolina Securities Act. Defendant appealed. The Court of Appeals, Eagles, J., held that: (1) defendant did not "transact business" within meaning of Securities Act, and (2) court was not required to instruct jury on specific misrepresentation as alleged in indictment.

Reversed and remanded in part, affirmed in part, vacated in part.

1. Securities Regulation ⇐192

Defendant did not "transact business," for purposes of section of Securities Act prohibiting unregistered persons from transacting business as dealer or salesman, where defendant misrepresented to victims that he had invested their money in stock options when, in fact, he never purchased stock options and where state's evidence showed only that defendant gave victims false impression that he was "broker" or "licensed broker"; statute prohibits transacting business without being registered, not offering to transact business without being registered. G.S. § 78A-36(a).

See publication Words and Phrases for other judicial constructions and definitions.

2. Securities Regulation ⇐195

Evidence that defendant advised victims, for 10% commission, to invest in securities of corporations and that defendant told victims that value of these securities would increase by various amounts in future, promising extravagantly large returns on their original investment, would support indictment under statute prohibiting person who receives consideration for advising another person as to value of securities or their purchase from defrauding other person, or engaging in acts that operate as fraud or deceit upon other person. G.S. § 78C-8.

3. Criminal Law ⇐814(6)
False Pretenses ⇐38

Although jury was not instructed on specific misrepresentation alleged in indictments charging obtaining property by false pretenses, there was no fatal variance between indictment, proof, and instruction, where state's evidence showed that defendant obtained property (victims' money) by false pretenses (statements that defendant was "broker" or "licensed broker" and that their money would
options). G.S. § 14-

4. Criminal Law ⇐
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SUPREM COURT OF THE UNITED S TES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

January 11, 1993

Mr. Gordon Widenhouse
PO Box 1070
Raleigh, NC 27602

Re: Ricky Lee Price
v. North Carolina
No. 92-6239

Dear Mr. Widenhouse:

The Court today entered the following order in the above entitled case:

The motion for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of North Carolina for further consideration in light of Morgan v. Illinois, 501 U. S. ------ (1992).

Very truly yours,

William K. Suter

William K. Suter, Clerk

93-___

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

RICKY LEE PRICE,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

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CERTIFICATE OF SERVICE

I, Gordon Widenhouse, a member of the bar of this Court, hereby certify that on the 29th day of December, 1993, one copy of the Petition for Writ of Certiorari (complete with appendices), and Petitioner's Request to Proceed *In Forma Pauperis* in the above-entitled case were served on Mr. Barry S. McNeill, Special Deputy Attorney General, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602, counsel for the Respondent herein, by first-class mail, postage pre-paid. I further certify that all parties required to be served have been served.

This the 29th day of December, 1993.

Respectfully submitted,

Gordon Widenhouse
Assistant Appellate Defender
Office of the Appellate Defender
1905 Meredith Drive, Suite 200
Durham, North Carolina 27713
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COUNSEL OF RECORD FOR PETITIONER

93-7348

APPENDIX TO PETITION

EDITOR'S NOTE

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the elements of premeditation and deliberation. In *State v. Jackson*, 317 N.C. 1, 343 S.E.2d 814 (1986), *judgment vacated*, 479 U.S. 1077, 107 S.Ct. 1271, 94 L.Ed.2d 133 (1987), we set forth several circumstances to be considered in determining whether a killing was done with premeditation and deliberation. Among them are: (1) want of provocation on the part of the deceased; (2) the conduct and statements of defendant before and after the killing; (3) threats and declarations of defendant before and during the course of the occurrence giving rise to the death of the deceased; (4) ill-will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased has been felled and rendered helpless; and (6) evidence that the killing was done in a brutal manner. 317 N.C. at 23, 343 S.E.2d at 827.

Our review of the record in light of the principles established in *Jackson* clearly reveals overwhelming evidence to support premeditation and deliberation and an absence of evidence to support murder in the second degree. There is no evidence of provocation by the deceased—all three eyewitnesses testified that the fight was initiated by defendant when deceased was lying asleep on the couch. During the trial, Geneva Bullock recanted her previous statement made to the police that her mother had a knife and was holding it against her sister. There is evidence that defendant stated "Let's get mama", before going downstairs to initiate the fight which led to defendant suffocating her mother with a pillow. There is evidence that defendant planned to kill her mother two weeks prior to this occasion but "chickened out." There is evidence that defendant placed different medications in her mother's beer and water in preparing to kill her. There is evidence that defendant specially prepared the pillow by wrapping it in plastic bags for the purpose of suffocating her mother. As for motive, there is evidence that defendant killed her mother for money: she knew her mother intended to remove her as the payee on her disability checks, she offered to split the disability check in the amount of $5,395.00 with her sister, Geneva, after the death of her mother, and, she called her grandmother to see if there were any insurance policies on the life of her mother. The ill-will and previous difficulty between defendant and the victim is clearly illustrated by the above. There is evidence that lethal blows were inflicted by defendant after the victim had been rendered helpless. The pathologist testified that the victim suffered great psychological stress from "air hunger" and died a brutal death. As we have stated previously on similar facts:

> The record before us discloses a brutal and senseless murder committed without justification or excuse. There is evidence of preparation.... As with any victim of strangulation, death came slowly. To suggest that the murderer did not act with premeditation and deliberation, on the evidence presented, if believed, is to invite total disregard of the facts.

State v. Strickland, 307 N.C. at 293, 298 S.E.2d at 658.

Based on the overwhelming evidence supporting premeditation and deliberation, the trial court correctly instructed the jury to return a verdict of murder in the first degree or not guilty. The prior unsworn statement by a co-conspirator which is subsequently repudiated by her under oath at trial is insufficient grounds to require an instruction on murder in the second degree.

In defendant's trial we find

NO ERROR.

326 N.C. 56

STATE of North Carolina

v.

Ricky Lee PRICE.

No. 585A87.

Supreme Court of North Carolina.

Feb. 7, 1990.

Defendant was convicted of first-degree murder and sentenced to death by [illegible]

Superior Court, Person County, Robert H. Hobgood, J., and he appealed. The Supreme Court, Whichard, J., held that: (1) other crimes evidence consisting of testimony regarding a defendant's virtually identical murder of second girl friend by ligature strangulation just two-and-one-half days before murder with which he was charged was admissible, for purpose of showing preparation, plan or knowledge; (2) witnesses' in-court identifications were not tainted by alleged unduly suggestive pretrial photographic array; and (3) sentence was not disproportionate or excessive as matter of law.

No error.

Frye, J., concurred in result and filed opinion.

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1. Jury ⇐131(8)

Restriction on scope of capital murder defendant's voir dire, to prevent defendant from inquiring about whether potential juror would require evidence of additional aggravating circumstances before he could vote to impose death penalty, was not abuse of discretion.

2. Jury ⇐131(13)

Though it is proper under appropriate circumstances to inquire of jurors whether they can follow law as charged by court, it is neither analogous nor proper to ask questions designed to gauge jurors' approval or to test their comprehension of law.

3. Jury ⇐131(4)

While counsel may inquire diligently into juror's fitness to serve, extent and manner of inquiry rest within sound discretion of trial court.

4. Jury ⇐108

Prospective jurors who indicated that they could not consider death penalty objectively under any circumstances were properly excused for cause, and court did not have to first inquire whether they could conscientiously apply law as charged by court, in prosecution for first-degree murder.

5. Criminal Law ⇐370, 372(4)

Other crimes evidence consisting of defendant's murder of second woman less than three days before homicide charged was admissible for limited purpose of showing preparation, plan or knowledge, particularly where both victims were killed in similar manner, by strangulation, after their limbs had been bound with shoe laces. Rules of Evid., Rule 404(b).

6. Criminal Law ⇐412(3)

Evidence regarding statements that murder defendant had made during hostage-holding incident, that he had already killed two people and that one or two more wouldn't make any difference, was admissible, notwithstanding any possible prejudicial effect. Rules of Evid., Rule 403.

7. Criminal Law ⇐370, 372(4)

Evidence that defendant had intruded on privacy of second girl friend, other than the girl friend he allegedly killed, by calling her name outside her bedroom window and removing two screens from home was admissible, notwithstanding its possible prejudicial effect, to show preparation, plan or knowledge. Rules of Evid., Rules 403, 404(b).

8. Criminal Law ⇐338(7), 659

Mere fact that State's witness had allegedly been embraced by member of murder victim's family was not ground for excluding witness' in-court identification of defendant.

9. Criminal Law ⇐339.10(8)

Witnesses' in-court identification of defendant as person they had seen fleeing from site of murder was admissible, notwithstanding possible suggestiveness of pretrial photographic array in which defendant's photograph was different size than other pictures, given witnesses' opportunity to observe defendant, remarkable detail of witnesses' descriptions, and fact that less than 30 hours had passed between witnesses' view of party fleeing from murder site and pretrial photographic array.

10. Criminal Law ⇐338(7)

Even relevant evidence may be excluded if its probative value is outweighed by danger that it may confuse or mislead jury.

11. Witnesses ⇐267

Though accused has right to cross-examine adverse witnesses, trial court is granted broad discretion in controlling scope of examination.

12. Criminal Law ⇐419(1.5)

Exclusion of hearsay testimony regarding defendant's hospitalization for mental problems was not abuse of discretion, where defendant had made tactical choice not to proffer evidence of impaired mental capacity and its possible effect on his ability to premeditate and deliberate murder.

13. Criminal Law ⇐386

Testimony of victim's parents, that victim had called them approximately one-and-one-half hours before she was murdered, was admissible as relevant to time of victim's death.

14. Criminal Law ⇐444

Telephone bill was not admissible, under business records exception to hearsay rule, to corroborate parents' testimony that murder victim had called them shortly before her death, absent proper foundation testimony by witness who was familiar with bill and methods under which it was made. Rules of Evid., Rule 803(6).

15. Criminal Law ⇐1169.2(7)

Erroneous admission, without proper foundation, of telephone bill indicating that victim had called parents shortly before she was killed from location approximately 22 miles from crime scene was not prejudicial error, given testimony of victim's parents regarding call and defendant's inculpatory statement to police that he was with victim at time of phone call.

16. Criminal Law ⇐438(4, 6)

Photographs of victim's body and of murder scene were admissible, notwithstanding their possible prejudicial effect, to accompany testimony of forensic pathologist who performed autopsy and testimony of officer who responded to call; photographs, which included shot of victim's body from back and second shot of her bound hands, were neither gory nor otherwise gruesome. Rules of Evid., Rule 403.

17. Criminal Law ⇐673(5)

Restriction placed by trial court on testimony of defense witness regarding defendant's prior use of drugs, which prohibited jurors from considering testimony at sentencing phase of capital murder trial other than for purpose of corroborating defendant's own testimony regarding his drug use, was not abuse of discretion, where witness admitted that she had no personal knowledge on subject.

18. Homicide ⇐282½

Whether murder had been committed as part of course of conduct that included commission of other crimes of violence, within meaning of special aggravating circumstance, was question for jurors at sentencing phase of capital murder case, given evidence that defendant's murder of girl friend was part of chain of events involving his other girl friends, including arson of second girl friend's home, all of which took place within five-day period. G.S. § 15A-2000(e)(11).

19. Criminal Law ⇐986.2(4)

Arson is "crime of violence," within meaning of special aggravating circumstance for crimes committed as part of chain of violent crimes, at least where defendant knows that inhabitants are present in home at time of arson. G.S. § 15A-2000(e)(11).

See publication Words and Phrases for other judicial constructions and definitions.

20. Criminal Law ⇐986.2(4)

In deciding whether crimes are committed as part of same course of conduct, within meaning of special aggravating circumstance, court may consider temporal proximity of events to one another, recurrent modus operandi, and defendant's motivation. G.S. § 15A-2000(e)(11).

21. Criminal Law ⇐717

Defendant charged with capital murder was not entitled to inform jury, as

mitigating circumstance, of fact that trial court was empowered to impose life sentence consecutive to defendant's sentence on other charge.

22. Criminal Law ⇐699

Counsel are allowed wide latitude in arguing hotly-contested criminal cases, and scope of this privilege is left to sound discretion of trial court.

23. Criminal Law ⇐722(2)
Homicide ⇐357(4)

Lack of remorse is not statutory aggravating circumstance and may not be argued as such at sentencing phase of capital murder case.

24. Criminal Law ⇐722(2)

Prosecutor's allusion, at sentencing phase of capital murder case, to defendant's apparent lack of remorse was rooted in observable evidence of demeanor displayed by defendant throughout trial, and did not unconstitutionally exploit defendant's silence at trial or his unwillingness to admit guilt.

25. Criminal Law ⇐723(1)

Error, if any, arising from prosecutor's allusion to rights of victim's family at sentencing phase of capital murder case was mere de minimis error, which trial court did not have to recognize ex mero motu.

26. Criminal Law ⇐1213.3

Prosecutor's closing argument at sentencing phase of capital murder case, in which he asserted that jury's verdict must not be based on any sympathy, forgiveness, or religious feelings they had about case, was not improper attempt to dissuade jurors from considering mitigating evidence offered by defendant in violation of Eighth Amendment prohibition against cruel and unusual punishment. U.S.C.A. Const.Amend. 8.

27. Homicide ⇐311

Trial court's instruction to jury at sentencing phase of capital murder case, that "aggravating circumstance" was one which would tend to make specific murder particularly deserving of death penalty, was not improper as falsely suggesting that single aggravating circumstance might warrant imposition of death penalty, without need to weigh aggravating and mitigating circumstances.

28. Homicide ⇐311

Trial court's instruction to jury at sentencing phase of capital murder case, that jurors could properly emphasize one circumstance over another and that three circumstances of one kind did not automatically and of necessity outweigh one circumstance of another, was not improper as placing emphasis on aggravating over mitigating circumstances.

29. Homicide ⇐358(1)

Trial court's instruction to jury on need to reach uniform verdict when, after four hours of deliberations, they had been unable to decide on penalty at sentencing phase of capital murder case was not improperly coercive, where trial court deliberately stated that it was in no way trying to force jurors to reach recommendation and urged them to reconcile their differences only if they could do so without surrendering their conscientious convictions.

30. Homicide ⇐358(1)

Trial court's request that jury resume its deliberations when, after four hours, they had been unable to decide on penalty at sentencing phase of capital murder case was not abuse of discretion.

31. Criminal Law ⇐1213.3

Requiring juror unanimity as to existence of mitigating circumstances at sentencing phase of capital murder case does not violate defendant's Eighth Amendment rights. U.S.C.A. Const.Amend. 8.

32. Criminal Law ⇐796

Informing jury of its "duty" to return recommendation of death when it finds mitigating circumstances insufficient to outweigh aggravating circumstances, and the latter sufficiently substantial to call for death penalty, does not violate defendant's constitutional rights.

33. Criminal Law ⇐1134(3)

Supreme Court's proportionality review of death penalty imposed in first-de-

gree murder case entails determining whether record supports aggravating circumstances found by jury, whether sentence was imposed under influence of passion, prejudice or some other arbitrary factor, and whether sentence is excessive or disproportionate to penalty imposed in similar cases. G.S. § 15A-2000(d)(2).

34. Criminal Law ⇐1134(2)

Supreme Court's proportionality review in capital murder case entails comparison of case with all cases arising since June 1, 1977 that have been tried as capital cases, and that have been affirmed as to both phases of trial by Supreme Court after appellate review. G.S. § 15A-2000(d)(2).

35. Criminal Law ⇐1134(2)

Supreme Court's proportionality review in capital murder case includes not only a reappraisal of relative weight of aggravating and mitigating circumstances, but also a scrutiny of entire record for all circumstances of the case, including manner of commission of crime and defendant's character, background, and mental and physical condition. G.S. § 15A-2000(d)(2).

36. Homicide ⇐356

Death penalty imposed in first-degree murder case arising out of defendant's attempt to disentangle himself from romantic commitments to several girl friends, by murdering two girl friends by ligature strangulation and setting fire to third girl friend's home, was not disproportionate or excessive as matter of law. G.S. § 15A-2000(d)(2).

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing the sentence of death entered by Hobgood, J., at the 8 September 1987 Criminal Session of Superior Court, Person County. Heard in the Supreme Court 14 December 1989.

Lacy H. Thornburg, Atty. Gen. by Barry S. McNeill, Asst. Atty. Gen., Raleigh, for State.

Malcolm Ray Hunter, Jr., Appellate Defender by Gordon Widenhouse, Asst. Appellate Defender, Raleigh, for defendant-appellant.

WHICHARD, Justice.

Defendant was tried on a true bill of indictment charging him with murder in the first degree. The jury found him guilty as charged and recommended a sentence of death. Our scrutiny of the record of the guilt and sentencing phases of his trial reveals that both were conducted without prejudicial error.

At approximately 10:00 a.m. on Sunday, 21 October 1984, a man later identified as defendant was spotted squatting in the woods near Hurdle Mills by Anne and Tony Wrenn, who had been walking with their son. The couple later testified that the man had jumped up suddenly, snatched a shirt from the ground, and fled. Ray Farrish, a passenger in a car travelling on State Road 1001 near the same woods, testified that at about the same hour he saw a shirtless, white male, whom he later identified as defendant, running towards a light blue car parked on the roadside. Mr. Farrish saw the man fumble with keys and attempt to unlock the car door. When the car in which Mr. Farrish was riding returned twenty minutes later, the blue car was gone.

The Wrenns discovered that the man had been crouched over the body of Brenda Smith, who a forensic pathologist later testified had died of ligature strangulation with "something broad." The victim's hands were tied behind her body with a brown shoestring.

Evidence was introduced at defendant's trial tending to show that he had been responsible for the death by ligature strangulation of Joan Brady in Danville, Virginia, on October 19th, less than three days before Brenda Smith's body was found. The hands and feet of Ms. Brady had been bound similarly with shoelaces. The State's evidence also revealed that defendant had had romantic liaisons with each victim and that he had told a recent female acquaintance that he wanted to move in with her, partly to get away from Joan Brady.

In addition, witnesses for the State who had been in contact with defendant the day after Brenda Smith's body was found described an episode at the house of defendant's uncle, James Hardy, which resulted in defendant's arrest. Around 5:00 p.m. on Monday, 22 October 1984, defendant's cousin Darryl Gammon went to James Hardy's house. Gammon testified that he followed noises to the basement and there found Hardy bound and gagged. Defendant was behind a curtain with a flashlight and a knife. Gammon attempted to restrain defendant with a gun, but defendant threatened him with the knife, then forced Gammon to release the gun by holding the knife to the throat of a fourth man. Police officers arrived, but defendant held them at bay for approximately five and one-half hours before he was arrested. In the interim, he uttered a number of incriminating statements, including the admissions that he had killed two people and would kill again, and that he was good with shoelaces. Both a class ring and a key chain belonging to Brenda Smith were found on defendant's person.

An inmate with whom defendant had been incarcerated pending his trial testified that defendant had admitted to killing Brenda Smith and Joan Brady. Defendant confided that he had been dating too many women, that he had been suffering from too much pressure, and that he had felt he had to eliminate somebody.

JURY SELECTION ISSUES

[1] Defendant's first assignments of error concern the selection of a jury for his trial. Defendant initially complains that the trial court erroneously sustained the State's objection to the question whether a potential juror "[felt] it should be necessary for the State to show additional aggravating circumstances before [he] would vote to impose the death penalty." Defendant argues that his question was proper because its intent was merely to plumb the potential juror's attitudes or prejudices; it did not impermissibly "stake out" the juror as to what his position might be under a given state of facts. *State v. Vinson*, 287 N.C. 326, 336, 215 S.E.2d 60, 68 (1975), *death penalty vacated*, 428 U.S. 902, 96 S.Ct. 3204, 49 L.Ed.2d 1206 (1976). He contends that the trial court's action thwarted his statutory right to conduct a voir dire examination of jurors in order "to ascertain whether there exist grounds for challenge for cause; and ... to enable counsel to exercise intelligently the peremptory challenges allowed by law." *State v. Allred*, 275 N.C. 554, 558–59, 169 S.E.2d 833, 835 (1969) (quoting *State v. Brooks*, 57 Mont. 480, 486, 188 P. 942, 943 (1920)). We disagree.

[2, 3] Although it is proper under appropriate circumstances to inquire of jurors whether they can follow the law as charged by the court, *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 2528, 65 L.Ed.2d 581, 589 (1980), it is neither analogous nor proper to ask questions designed to gauge jurors' approval or to test their comprehension of the law. Moreover, while counsel may inquire diligently into a juror's fitness to serve, the extent and manner of that inquiry rests within the sound discretion of the trial court. *State v. Parks*, 324 N.C. 420, 423, 378 S.E.2d 785, 787 (1989). Defendant has failed to show either a clear abuse of discretion on the part of the trial court or resulting prejudice.

Defendant next raises the issue that his constitutional rights under the sixth and fourteenth amendments to the United States Constitution and under article I, section 19 of the Constitution of North Carolina were violated by the State's use of peremptory challenges to purge the jury of prospective jurors expressing reservations about the death penalty. This Court, cognizant of arguments to the contrary, such as that articulated in *Brown v. Rice*, 693 F.Supp. 381 (W.D.N.C.1988), has consistently rejected this position. *See, e.g., State v. Quesinberry*, 325 N.C. 125, 142–43, 381 S.E.2d 681, 692 (1989). Defendant presents no new reason for this Court now to question the soundness of its prior holdings in this regard.

[4] Defendant also contends that his right to conduct a voir dire of potential jurors was abridged when two jurors who

had expressed reservations about the death penalty were excused for cause without being asked whether, despite such objections, they could "conscientiously apply the law as charged by the court." *Adams v. Texas*, 448 U.S. at 45, 100 S.Ct. at 2526, 65 L.Ed.2d at 589. Both jurors expressed their opposition to the death sentence in unequivocal terms, even after defendant's attempt to rehabilitate them. In both instances the jurors answered in the affirmative to the State's question whether the jurors' feelings about the death penalty "would prevent or substantially impair" their ability to vote for or to impose the death penalty.

In *State v. Quesinberry*, 325 N.C. at 139, 381 S.E.2d at 690, we held that there was no error in asking prospective jurors whether their views about the death penalty would "prevent or substantially impair" their "ability to sit on [the jury.]" This inquiry effectively mirrored the words of the United States Supreme Court in *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841, 851–52 (1985) (quoting *Adams v. Texas*, 448 U.S. at 45, 100 S.Ct. at 2526, 65 L.Ed.2d at 589), that such a juror may be removed for cause if his views about the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."

In this case the State's similar narrowing of the *Wainwright* inquiry in order to determine whether jurors' reservations might inhibit their consideration of the death penalty reiterates the essential language set out in *Adams* and *Wainwright*. Further, it is apparent from the responses of both prospective jurors here that they could not have considered the death penalty objectively under any circumstances, even under the guidance of the trial court's instructions. The trial court did not err in concluding that these jurors fit the profile of jurors appropriately excludable for cause as described in *Adams* and its progeny.

GUILT PHASE ISSUES

[5, 6] Defendant assigns error to the admission of witnesses' testimony describing two instances of defendant's prior misconduct—the murder of Joan Brady and the incident of holding his uncle hostage. The first offense was recounted through the testimony of Joan Brady's sister, who discovered the body, and that of an investigating officer. This testimony was admitted, accompanied by the trial court's repeated instruction to the jury that such evidence was before it for the sole purpose of showing defendant's knowledge. Each witness described the appearance of the victim's body, found on Friday, 19 October 1984, face-down in bed, her limbs bound with shoelaces. The admission of the pathologist's testimony, which added that the victim had died as the result of a "soft ligature," like the handkerchief found knotted around her neck, was similarly restricted to the purpose of showing preparation, plan, or knowledge of the defendant. Defendant contends that this testimony was only "minimally relevant" and that its prejudicial effect outweighed any probative value.

Defendant restates this contention with regard to the testimony of his cousin Darryl Gammon and others, who recounted the details of defendant's act of holding his uncle hostage the day after Brenda Smith's death. Defendant assigns error as well to the admission of statements he made in the presence of officers who were summoned to the scene. These statements included defendant's admission that he was "good with shoelaces" and that he had "already killed two and one or two more wouldn't make any difference."

Upon defendant's motion to suppress evidence of both occurrences, the trial court conducted extensive voir dire, after which it concluded that testimony regarding the ligature strangulation of Joan Brady was "virtually identical prior misconduct" taking place only two and one-half days before the murder of Brenda Smith. The trial court held the pathologist's testimony admissible under N.C.R.Evid. 404(b) for the purpose of showing preparation, plan or knowledge, as its charge to the jury later reflected.

Voir dire testimony reiterating statements defendant had made during the hostage-holding incident also was ruled relevant and admissible under Rule 404(b) for the limited purpose of showing motive, intent, preparation, plan, knowledge or identity. In addition, the trial court reported in its order that it had applied the balancing test stated in Rule 403 and found that the probative value of these statements substantially outweighed any prejudicial effect they might have.

Our appraisal of the testimony of which defendant complains convinces us that the trial court's assessment of its admissibility was accurate. This Court recently noted that Rule 404(b) was inspired by the observation in *State v. Young*, 317 N.C. 396, 346 S.E.2d 626 (1986), that evidence of prior offenses by a defendant is "inadmissible on the issue of guilt if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged." *State v. Artis*, 325 N.C. 278, 299, 384 S.E.2d 470, 481 (1989) (quoting *Young*, 317 N.C. at 412, 346 S.E.2d at 635). Rule 404(b), a codification of the *Young* rule, provides specific guidance as to how prior offenses might otherwise be relevant. The probative weight of such evidence and its "use ... as permitted under Rule 404(b) is guided by two constraints: similarity and temporal proximity." *Id.* Factual disparity or the stretch of time dilute commonalities, and "the probative value of the analogy attaches less to the acts than to the character of the actor." *Id.* Conversely, testimony regarding a murder that was "virtually identical" committed less than seventy-two hours before the murder for which the defendant is on trial lends more ballast to the act than to the character of the actor. Under these circumstances, the probative value of such evidence is unassailable.

Testimony regarding an incident occurring less than forty-eight hours after the second murder, in which defendant admitted to having killed more than once, was similarly of substantial probative value and patently tipped the scales away from any unfair prejudicial effect. *See* N.C.G.S. § 8C-1, Rule 403 (1988). Following a voir dire, the trial court carefully assessed the admissibility of the testimony in accordance with statutory mandate and was careful to divert the jury's attention away from character and towards the purposes for which evidence is deemed admissible by Rule 404(b). We hold that it did not err in doing so.

[7] We draw the same conclusion with regard to testimony by Janice Bates, a woman with whom defendant had lived from June 1983 to September 1984, which defendant contends was admitted despite its irrelevance and its tendency to serve only as evidence of his bad character. Ms. Bates testified that she heard defendant call her name outside the bedroom of her mobile home between 12:00 and 2:00 a.m. Monday, 22 October 1984, and that this had "frightened" her. The next morning she discovered that the screens had been removed from the two bedroom windows. In response to defendant's objection, the trial court again conducted voir dire and limited the witness' proffered testimony, ruling that what remained was relevant and that its probative value was not substantially outweighed by the danger of unfair prejudice, confusing the issues or misleading the jury.

Although the trial court did not assess the admissibility of Ms. Bates' testimony in terms of Rule 404(b) as it had for the Brady murder and the hostage-holding, it is clear this act was similarly offered to prove preparation, plan or knowledge. The temporal proximity of the incident recounted by Ms. Bates, not only to the crime charged, but also to the Brady murder and the hostage-holding, plus the fact that it was an intrusion upon the privacy of a former girlfriend, clearly demonstrate its admissibility for several of the purposes cited in Rule 404(b). Its fit into this pattern of incidents lends it probative value far exceeding any tendency to prejudice the jury, for the latter is at best negligible where the conduct exhibited by defendant was so much less blameworthy than that of the other two incidents. Although there was little if any probative value to Ms. Bates' admission that defendant's approach

"frightened" her,[1] its prejudicial impact, if any, was *de minimis*, and could not possibly have had any effect on the jury's ultimate verdict. N.C.G.S. § 15A-1443(a) (1988).

[8] Defendant also contends that the trial court erroneously denied his motion to suppress in-court identification or other identification testimony by the Wrenns and by Ray Farrish. His objections to the testimony of Ms. Wrenn are twofold. First he notes the fact that after testifying, Ms. Wrenn was embraced by a member of the victim's family, and he argues that this act violates proscriptions stated in *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440, *reh'g denied*, 483 U.S. 1056, 108 S.Ct. 31, 97 L.Ed.2d 820 (1987), against putting before the jury written commentary on the loss felt by the victim's family. This application of the precepts stated in *Booth* distorts its rationale. A spontaneous embrace shares no similarities with the presentation to the jury of "victim impact statements" condemned in *Booth*. Moreover, the only reference in the record to this embrace indicates that it occurred "after court was over"; there is no indication of record that it was viewed by members of the jury. In denying defendant's motion to strike Ms. Wrenn's identification testimony on these grounds, the trial court concluded that Ms. Wrenn and the family member were not acquainted and that the embrace was no more than a display of encouragement and gratitude.

We conclude that the trial court ruled correctly. Further, it was only after the voir dire of Tony Wrenn, rather than at the time of the alleged embrace, that defendant objected or made a motion to strike Ms. Wrenn's earlier identification testimony. A display that made so little impression upon the defendant at the time of its occurrence could have had no conceivable prejudicial effect on the jury.

[9] Second, defendant contends that the photographic identification procedure used by officers for the benefit of Ray Farrish and the Wrenns was impermissibly suggestive and tainted the Wrenns' in-court identification of defendant as the man they had seen run from the vicinity of Brenda Smith's body the morning of 21 October 1984.[2] The procedure to which defendant objected entailed a random display of two sets of photographs. The first set depicted six wedding groups or couples; the second was a pair of black-and-white photographs, one of which was a blow-up of defendant's face from his wedding photograph. Of the first set, all but the photograph of defendant and his bride measured eight-by-ten inches; defendant's wedding photograph measured only four-by-six. In addition, the appearance of each male depicted, other than defendant, differed from the general description Ms. Wrenn initially had given the officers. Defendant contends that this meagre field of comparison and the size discrepancy of the photographs predisposed the Wrenns to select defendant's photograph from both sets.

The trial court conducted voir dire of Anne Wrenn, of the officer who heard her description shortly after seeing the man flee from the woods, and of the officer who conducted the photo-identification procedure. After making extensive findings of fact, the trial court concluded that Ms. Wrenn had had "ample opportunity to gain a reliable impression" of the man she viewed in the woods, that her attention on the man was "strong and focussed," that her description to officers of the man she had seen was accurate and matched the physical characteristics of defendant, and that the time lapse between Ms. Wrenn's observation of the man Sunday morning was not so long as to significantly diminish her ability to make a strong and reliable identification the following afternoon. With regard to the identification procedure, the trial court concluded that, given the

1. The trial court admonished the witness in its ruling on the admissibility of her testimony that she was not to indicate to the jury the reason for that fear—that police officers had visited her home that afternoon in their search for defendant and had divulged that defendant was suspected in two murders.

2. The trial court sustained defendant's objection to the in-court identification by Ray Farrish.

high degree of certainty of Ms. Wrenn's identification, the pretrial identification procedure had not been "so impermissibly suggestive and conducive to irreparable mistaken identification as to constitute a denial of due process of law."

The pretrial identification procedure experienced independently by Tony Wrenn was virtually identical to that of his wife. Following voir dire of Tony Wrenn, the trial court recognized the striking specificity of Mr. Wrenn's initial observation of the man in the woods, including Mr. Wrenn's awareness of the man's size, weight, notable musculature, the color and neat cut of his hair and beard, and a prominent nasal bridge, all of which were similar to defendant's physical characteristics. Based upon Tony Wrenn's excellent opportunity to observe the man in the woods, the high degree of his attention, and the minimal time lapse between that occurrence and the pretrial photo identification, the trial court again concluded that the pretrial procedure was reliable and that Mr. Wrenn's subsequent in-court identification was not tainted by anything impermissibly suggestive in the pretrial procedure.

On the evening of 22 October 1984, Mr. Farrish was shown only the group of wedding photographs. Although at that time he identified the photograph of defendant as the one most resembling the man he had seen the morning before, in court Mr. Farrish misidentified the photograph he previously had selected. Based upon Mr. Farrish's voir dire testimony, the trial court concluded that although the misidentification went to the credibility of the witness rather than to the admissibility of his testimony, the in-court identification by Mr. Farrish was not admissible because it did not appear to be of independent origin. However, Mr. Farrish was permitted to describe for the jury the appearance of the man he had seen that morning, for the trial court did not find that this observation had been tainted by any pretrial procedure.

The test to be applied when the admissibility of identification evidence is challenged is to seek facts that "reveal a pretrial identification procedure so impermissibly suggestive that there is a very substantial likelihood of irreparable misidentification." *State v. Pigott*, 320 N.C. 96, 99, 357 S.E.2d 631, 633 (1987) (quoting *State v. Harris*, 308 N.C. 159, 162, 301 S.E.2d 91, 94 (1983)). Assuming arguendo that the use of defendant's photograph in both of two very limited sets and the discrepancy in size of his wedding photograph from the remaining five eight-by-tens presented the Wrenns with photographic groups that were "unnecessarily suggestive," *id.*, their identification of defendant based upon their view of these photographs was not inadmissible unless the procedure led to a "substantial likelihood of misidentification." This possibility is tested by weighing the following factors against the corrupting effect of the suggestive procedure itself:

1) The opportunity of the witness to view the criminal at the time of the crime;
2) the witness' degree of attention;
3) the accuracy of the witness' prior description;
4) the level of certainty demonstrated at the confrontation; and
5) the time between the crime and the confrontation.

Id. at 99-100, 357 S.E.2d at 634 (quoting *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253, 53 L.Ed.2d 140, 154 (1977)).

As the trial court observed in its findings of fact following voir dire of the Wrenns, the conditions were amply beneficial for each to have had an excellent opportunity to view the defendant's profile and physique, both were concentrating acutely on what they were seeing, both described in remarkable detail salient facial and general physical features of the man they had seen, and both were so certain that they had identified the right man that each testified defendant was he, "unless he had a double" or an "identical look-alike." That less than thirty hours had passed between their seeing the man in the woods and selecting defendant's photographs also buttresses the trial court's conclusion that there was scant likelihood that any suggestiveness in the pretrial identification procedure could

have led to a misidentification of defendant by the Wrenns.

Because Mr. Farrish was not permitted to identify defendant in court but was allowed only to describe the man he saw the morning of 22 October 1984, only that description arguably was tainted by a suggestive pretrial procedure. We reject this possibility for two reasons. First, Mr. Farrish was shown only the wedding photographs. He thus did not experience the suggestiveness in the duplication of defendant's face into black-and-white, which defendant argues affected the Wrenns. Second, the record reflects that Mr. Farrish's description of the shirtless man he saw fumbling with keys was general enough to be perfectly consistent with the viewpoint of one driving past: Mr. Farrish described the man's height and approximate weight, his race, the color of his hair, the fact he was shirtless, and his actions. None of these characteristics is so noteworthy that it is likely to have originated in a view of the photographs rather than in the view of defendant on the morning of the crime.

Defendant next contends that the trial court improperly restricted his attempts to cross-examine witnesses Janice Bates and Detective Holley about what they knew or had observed of defendant's history of mental illness and aberrant behavior. Janice Bates was prevented from testifying that defendant had told her of previous hospitalizations for mental illness, and Detective Holley was precluded from reading from the transcript of audio tapes made during the hostage-holding incident at the Hardy house. Detective Holley was permitted to testify as to his recollection of defendant's statements made at that time and to refresh that recollection from the transcript, but the trial court sustained the State's objection to reading from the transcript unless it was introduced in its entirety. The court added that it would permit defendant to offer the transcript into evidence at that time, but defendant's counsel deferred, stating that he had made "a tactical choice and that choice probably will be not to put on evidence."

Relying upon this Court's language in *State v. Helms*, 322 N.C. 315, 367 S.E.2d 644 (1988) and in *State v. McElrath*, 322 N.C. 1, 366 S.E.2d 442 (1988), which stresses the "relatively lax" standard of relevant evidence, *McElrath*, 322 N.C. at 13, 366 S.E.2d at 449, defendant argues that testimony tending to show his mental imbalance was relevant on the issue of whether he could have formed the specific intent to kill. Under a standard allowing "any evidence calculated to throw light upon the crime charged," *id.* (quoting *State v. Huffstetler*, 312 N.C. 92, 104, 322 S.E.2d 110, 118 (1984), *cert. denied*, 471 U.S. 1009, 105 S.Ct. 1877, 85 L.Ed.2d 169 (1985)), defendant accurately argues that evidence of his limited or impaired mental capacity was relevant to the issue of whether he had the capacity to premeditate or deliberate, *State v. Shank*, 322 N.C. 243, 248, 367 S.E.2d 639, 643 (1988).

[10–12] Not all relevant evidence, however, is admissible. Even relevant evidence may be excluded if its probative value is outweighed by the danger that it may confuse or mislead the jury. *State v. Knox*, 78 N.C.App. 493, 495, 337 S.E.2d 154, 156 (1985). Although an accused is assured the right to cross-examine adverse witnesses, the trial court is granted broad discretion in controlling its scope. Absent a showing of abuse of that discretion, such rulings will not be disturbed on appeal. *E.g., State v. Herring*, 322 N.C. 733, 743, 370 S.E.2d 363, 368 (1988). When a defendant has made a tactical choice not to exercise his right to call witnesses or to present a defense, it is well within the trial court's discretion to require that all of a document be offered into evidence, rather than merely those self-serving portions reflecting upon a defendant's mental imbalance. It is likewise well within the trial court's discretion to exclude hearsay testimony of defendant's hospitalization for mental problems when defendant has made a tactical choice not to proffer evidence of impaired mental capacity and its possible effect on his ability to premeditate and deliberate. Absent a context to which such evidence might relate, its relevance is considerably diluted, and its potential for confusion correspond-

ingly enhanced. Under such circumstances, it is both proper and within the trial court's discretion to bar the admission of such evidence through cross-examination.

[13] Defendant next assigns error to the admission of testimony by the victim's parents that she had called them collect around 8:45 a.m. on 21 October 1984, and of a telephone bill corroborating that fact. Although the trial court prohibited the victim's parents from testifying as to the contents of the phone call, it ruled that testimony that their daughter had called collect was material and relevant to show that she was alive at the time. An officer subsequently was permitted to testify that he had traced the number of the telephone from which the call had been made to a phone booth in Chapel Hill, twenty-two miles from where the victim's body was found later the same morning. In the same order the trial court ruled defendant's statement to police officers that he was with Brenda at the time she called her parents had been freely, voluntarily, and understandingly made. This conclusion is soundly supported by competent evidence in the record.

Defendant's contentions that the court erred in admitting the testimony of the victim's parents are wholly without merit. It is well established that the identity of a caller may be established by testimony that the witness recognized the caller's voice. *State v. Rinck*, 303 N.C. 551, 568, 280 S.E.2d 912, 924 (1981); *State v. Williams*, [illegible] N.C. 680, 698, 220 S.E.2d 558, 571 (1975). A witness' identification of the speaker by voice is not hearsay because there is no "assertion" implied or intended in that communication. *See* N.C.G.S. § 8C–1, Rule 801(c) (1988). *See also State v. Peek*, 89 N.C.App. 123, 125, 365 S.E.2d 320, 322 (1988) (defendant's name and address inscribed or printed on envelope or its contents not an assertion). The fact that the telephone call was collect was within the first-hand knowledge of Mr. Smith, who testified that he had accepted it. *See* N.C.G.S. § 8C–1, Rule 602 (1988). Even assuming erroneous admission of this evidence, the testimony regarding the call can have had no possible prejudicial impact on the outcome of defendant's trial when defendant admitted that he was with the victim when she called her parents; the officer's testimony can have had none by virtue of its utter insignificance.

[14, 15] The telephone bill was admissible to corroborate the Smiths' testimony about when they received the call from their daughter. *See* 1 Brandis on North Carolina Evidence 3d § 142 at 648; § 155 at 713 (1988). However, the State also offered the Smiths' bill substantively: the number recorded as coinciding with the victim's call to her parents led an officer to the booth from which the call had originated. The trial court, relying upon the "business records exception" to the hearsay rule, N.C.G.S. § 8C–1, Rule 803(6) (1988), determined that the information contained in the telephone bill was inherently reliable because of the routine manner in which such records are universally prepared.

A telephone bill is a "data compilation ... kept in the course of a regularly conducted business activity" within the meaning of the business records exception to the hearsay rule. N.C.G.S. § 8C–1, Rule 803(6) (1988). As such, it is admissible when "a proper foundation ... is laid by testimony of a witness who is familiar with the ... records and the methods under which they were made so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy." *State v. Springer*, 283 N.C. 627, 636, 197 S.E.2d 530, 536 (1973). No such witness testified in this case, and absent the laying of a foundation for its admission, the Smiths' telephone bill was not properly admitted for substantive purposes.

Data included in the bill enabled an officer to trace the victim's call and to testify that it had been generated from a location only twenty-two miles from where her body was found one and one-half hours later. This fact did nothing to support defendant's averred innocence. However, in the face of the quantum of other evidence, including defendant's inculpatory statements made in the presence of police offi-

vers and his admission that he was with the victim when the phone call was made, evidence of their location at the time was of little moment. We thus hold that the error of admitting the telephone bill without a foundation is not so prejudicial that there is any reasonable possibility that a different verdict would have been reached had the trial court barred the bill's admission. N.C.G.S. § 15A-1443(a) (1988).

[16] Defendant next takes issue with the admission into evidence of seven photographs, charging that their use was excessive and repetitious and their effect inflammatory and unfairly prejudicial. When the photographs were initially introduced into evidence to illustrate the testimony of Anne Wrenn, the trial court specifically asked defense counsel if he had any objection to the tender of the photographs into evidence. He replied that he had none. Defendant did not fail to object, however, when the photographs subsequently were made the subject of the testimony of the photographer who took them and tendered "for all purposes." The trial court balanced the probative value of the photographs against their tendency to inflame the emotions of the jury in accordance with N.C.G.S. § 8C-1, Rule 403 and overruled defendant's objection.

The trial court did not err in its conclusions. It is not apparent from the record that when the photographs were first introduced into evidence, their purpose was limited to their illustrative use. Defendant thus arguably waived his objection to subsequent substantive use. *See State v. Gladden*, 315 N.C. 398, 414-15, 340 S.E.2d 673, 684, *cert. denied*, 479 U.S. 871, 107 S.Ct. 241, 93 L.Ed.2d 166 (1986). However, even if defendant's subsequent objection is understood to focus upon prejudicial repetition, a review of the subject matter of the photographs and the occasions for their use reveals that defendant's assignment of error nevertheless lacks merit.

Although there is no bright line test for gauging at what point the use of photographs becomes excessive, *see State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988), the illustrative and substantive use of the seven photographic exhibits in this case falls well within nonInflammatory limits. Only two photographs of the victim at the crime scene were before the jury—one a shot of her body from the back, the other a shot of her bound hands only—and these were neither gory nor otherwise gruesome. The five remaining photographs of the crime scene were primarily of the physical setting itself, in which the victim's body figured only incidentally. The photographs were later reintroduced for substantive purposes when they were authenticated by the photographer, but his testimony did not include a description of their contents, and the record does not reflect that they were used illustratively or exhibited to the jury for any other reason at that time. Exhibit 1, which depicted the victim's full body, was used on two other occasions for illustrative purposes—once to accompany the testimony of the forensic pathologist who performed the autopsy,[3] and once to accompany the testimony of the officer who responded to a call from the Wrenns. These facts reveal defendant's contentions to have been baseless with regard not only to the unobjectionable content of the photographs, but also to their restrained use. Defendant's assignments of error pertaining to this issue are thus overruled.

SENTENCING PHASE

[17] During the sentencing phase of his trial defendant called Janice Bates to the stand to testify about defendant's use of drugs throughout the period they had cohabited. Ms. Bates admitted that she had no personal knowledge of defendant's use of drugs, but testified that defendant had told her that he had used drugs in the past.

3. Defendant did not object to admitting autopsy photographs into evidence to illustrate the pathologist's testimony, but he did object to their being exhibited to the jury. The trial court ruled accordingly, prohibiting the jury from viewing them at that time. It is not apparent from the record that these photographs were ever given to the jury to view, even during its deliberations.

Upon the State's objection, the trial court instructed the jury that it could consider this testimony only for the purpose of corroborating or impeaching defendant's testimony. This limitation on the substantive use of defendant's statements was reiterated during the trial court's final charge to the jury. Defendant argues that restricting this portion of Ms. Bates' testimony to its use as corroboration or impeachment denied him his constitutional right to offer mitigating evidence in a sentencing proceeding. *See Eddings v. Oklahoma*, 455 U.S. 104, 113-14, 102 S.Ct. 869, 876-77, 71 L.Ed.2d 1, 11 (1982).

This Court has held that in a capital sentencing proceeding a hearsay statement by a defendant or by a witness for the defense that is relevant to a sentencing issue and that bears "suitable indicia of reliability under a due process standard" must be admitted. *State v. Barts*, 321 N.C. 170, 181-82, 362 S.E.2d 235, 241 (1987). In this case, however, defendant's statements to Ms. Bates need not be analyzed for their trustworthiness, for defendant's admission to the use of drugs in the indefinite past bore no relevance to the possibility that he was affected by drugs throughout the five-day period that included two murders. The suggestion that past use might indicate inebriation during the period at issue is tenuous at best, and the trial court properly restricted its consideration by the jury to corroboration.

Moreover, assuming relevance arguendo, any error in the restriction of Ms. Bates' testimony was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988). Following the trial court's limiting instruction, Ms. Bates was permitted to testify that on the day in September 1984 when she asked defendant to move out, his demeanor differed from when he was either sober or drunk—that his speech was slurred and "he acted silly, smoked a lot." Not only did this testimony suggest drug use, but defendant's periodic use of drugs was described on the stand by defendant himself, by his mother, by a childhood friend and by his psychiatrist.

[18] Ten mitigating circumstances were submitted for the jury's consideration in recommending a penalty for defendant's murder of Brenda Smith. The jury found only one—that defendant's family had a history of mental illness and emotional distress. Only two aggravating circumstances were submitted and found unanimously by the jury: in reference to his conviction for the murder of Joan Brady, that defendant previously had been convicted of a felony involving the use of violence to the person, N.C.G.S. § 15A-2000(e)(3) (1988); and, in reference to offenses committed against Elaine Clay, Robbie Davis, James Hardy, and Tony Gammons, that the murder of Brenda Smith was part of a course of conduct that included the commission of other crimes of violence, N.C.G.S. § 15A-2000(e)(11) (1988). Defendant argues that the evidence fails to support the latter circumstance. A review of the evidence presented to the jury in the penalty phase proves the error of defendant's perception.

Elaine Clay, who had testified during the guilt-innocence phase of defendant's trial that defendant had asked to move in with her in order to "get away from" Joan Brady, was recalled in the penalty phase to recount the events of the early morning hours of 22 October 1984. She testified that she and her nine-year-old son were awakened by the sound of the smoke detector. They left the burning house and returned the next morning after the fire had been extinguished to find structural damage, including charred floor joists beneath her bedroom. The fire marshall who investigated the fire determined that it had originated from a pile of boxes. He also testified that he had "smelled something like gasoline." An experienced agent for the State Bureau of Investigation who also investigated the fire testified that in his opinion it had been set intentionally.

In addition to this evidence the State introduced the testimony of a police officer who was present at defendant's forceful occupation of his uncle's house the next evening. The officer related that defendant had "started talking about a house burning down, and he stated it was Elaine

Clay's house ... and stated that a friend had done it, and ... that he should have just killed her himself." Asked by the witness if he knew whether Ms. Clay was in the house at the time, defendant had responded "yes, she was." Another officer present at James Hardy's house testified that defendant had said earlier that he had burned Ms. Clay's house to the ground and that her little boy was in it with her at the time. Only later did defendant say that "a friend had set the fire" and that Ms. Clay "got what she deserved."

The trial court instructed the jury that if it found beyond a reasonable doubt that defendant had committed arson at a time when Elaine Clay and her son were in bed, it would find the aggravating circumstance that defendant had killed Brenda Smith as part of the same course of conduct. Defendant argues that these instructions were erroneous because they did not require the jury to find that this crime involved "violence against another person or persons." N.C.G.S. § 15A-2000(e)(11) (1988). He reasons that arson is not an inherently violent crime and that it was error to submit this circumstance to the jury when the State failed to present substantial evidence of the use or threat of violence in addition to the fact of the fire's occurrence.

[19] Arson is "the wilful and malicious burning of the dwelling house of another person." *State v. Vickers*, 306 N.C. 90, 100, 291 S.E.2d 599, 606 (1982). This definition presupposes that the dwelling is inhabited, even if its inhabitants are absent at the time of the offense. *See id.* In their absence, arson is arguably not an offense that inherently involves "violence against another person or persons." However, when inhabitants are present and the perpetrator is aware of this fact, his act of igniting their dwelling is indisputably an act of violence, its force intended not only to damage the house but also to injure its inhabitants.

We hold that the trial court's charge to the jury was sufficient: by coupling the fact that the dwelling was occupied with the fact of a "wilful and malicious" burning, the instruction comprehended the threat to human well being that the statute's aggravating circumstance contemplates. *Cf. State v. Hunt*, 323 N.C. 407, 429-30, 373 S.E.2d 400, 414-15 (1988) (absence of evidence that the house was occupied at the time of dynamiting provided basis for trial court's striking convictions on grounds that these did not involve the use or threat of violence to a person).

[20] Whether the burning of Elaine Clay's house early Monday morning and the events at the home of James Hardy on Monday evening were part of the same course of conduct that included the murder of Brenda Smith depends upon a number of factors, among them the temporal proximity of the events to one another, a recurrent *modus operandi*, and motivation by the same reasons. *See State v. Robbins*, 319 N.C. 465, 528, 356 S.E.2d 279, 316, *cert. denied*, 484 U.S. 918, 108 S.Ct. 269, 98 L.Ed.2d 226 (1987). Although the jury was properly admonished not to consider the murder of Joan Brady as part of this course of conduct, *see State v. Goodman*, 298 N.C. 1, 29, 257 S.E.2d 569, 587 (1979), it is apparent from a review of the chronology of events beginning Thursday, 18 October 1984, and culminating Monday evening, 22 October 1984, that defendant's actions with regard to Elaine Clay and James Hardy were all elements of a five-day rampage fueled by defendant's overcommitment to women.

On Thursday afternoon, defendant stopped at Elaine Clay's house and asked to move in with her in order to "get away from Joan ... Brady." He was at Joan Brady's house at 9:00 p.m. and at Brenda Smith's by 11:30 p.m. Joan Brady was found dead in her apartment the afternoon of Friday, October 19th. On Saturday afternoon defendant drove Brenda Smith from her house in Danville, Virginia to Greensboro. Later that evening defendant appeared alone at the Statesville home of a former girlfriend, whom he had not seen in four years, to tell her that he wanted her "to meet his fiancee." Defendant later picked up Brenda at a nearby convenience store where she had been waiting for him,

and they drove back towards Greensboro, pulling off the road around 9:00 p.m. and spending Saturday night in her car. Brenda Smith called her parents at 8:42 a.m. and was found dead little more than an hour later. Defendant returned in Brenda's car to Danville, where he was seen walking down the street and greeted by Elaine Clay. Sometime after midnight Sunday, he appeared at Janice Bates' mobile home, calling her name. Around 1:45 a.m. Monday he ignited the boxes under Ms. Clay's bedroom. Monday evening defendant arrived at the home of his uncle James Hardy, bound and gagged his uncle, poured lighter fluid on his head and attempted to ignite it, and held a knife to the throat of Tony Gammon. The police arrived at 7:05 p.m. and were held at bay for five and one-half hours.

Not all of these occurrences were violent, but all occurred over a five-day span and involved either contact with a former girlfriend or, in the case of the hostage-holding, admissions about their fates. In addition to their proximity in time, all demonstrated the common subject matter of defendant's romantic liaisons and his mood of intense anxiety about juggling these relationships. Comments about being "good with shoelaces" made during the hostage-holding and the role of shoelaces in the murders of Brenda Smith and Joan Brady evoke a common *modus operandi*. The arson of Elaine Clay's house coupled with the attempt to ignite his uncle with lighter fluid and comments made at the time about his (or a friend's) setting fire to the Clay house also reveal commonalities. Defendant's activities from Thursday, 18 October 1984, through Monday, 22 October 1984, describe an increasingly frenzied pattern of both inconsequential and violent contacts, all apparently motivated at least in part by the "pressure" brought upon defendant by his overinvolvement with women. We hold that these facts firmly support the submission to the jury of the aggravating circumstance that the murder of Brenda Smith on Thursday, 18 October 1984, was part of a course of conduct involving the commission of other crimes of violence, to wit, the arson of Elaine Clay's house and the hostage-holding on Monday, 22 October 1984.

[21] Defendant next assigns error to several issues arising out of the parties' closing arguments. He first contends there was error pertaining to the closing remarks of his own counsel, who was barred by the trial court from arguing "anything concerning the possibility of parole." He also asserts that the trial court erred in disallowing his proffered argument that if the jury returned a recommendation of a life sentence, the trial court was empowered to require the sentence to commence at the termination of the life sentence he was presently serving in Virginia.

Defendant argues that informing the jury of the legal effect of a life sentence upon parole eligibility in North Carolina and assuring jurors that the trial court was empowered to impose a life sentence consecutive to another would have mitigating value. Thus, even though such evidence would relate to neither defendant's culpability for the crime nor the circumstances of its commission, defendant perceives his license to present these matters to the jury as comprehended in his constitutional right to put before the jury "any relevant mitigating evidence." *Skipper v. South Carolina*, 476 U.S. 1, 4, 106 S.Ct. 1669, 1671, 90 L.Ed.2d 1, 6 (1986) (quoting *Eddings v. Oklahoma*, 455 U.S. at 110, 102 S.Ct. at 874, 71 L.Ed.2d at 9). Defendant also perceives his entitlement to argue these issues under N.C.G.S. § 84-14 (1985), which regulates the practice of law in this State and provides: "In jury trials the whole case as well of law as of fact may be argued to the jury."

While it is generally true that counsel's argument should not be impaired without good reason, *Watson v. White*, 309 N.C. 498, 507, 308 S.E.2d 268, 274 (1983), one "good reason" to limit argument is its irrelevance. "[C]ounsel [may not] argue principles of law not relevant to the case." *State v. Monk*, 286 N.C. 509, 515, 212 S.E.2d 125, 131 (1975). This Court has noted many times that a criminal defendant's status under the parole laws is irrelevant to a determination of his sentence

and that it cannot be considered by the jury during sentencing. *E.g., State v. Robbins*, 319 N.C. at 518, 356 S.E.2d at 310. That this holding passes muster under the United States Constitution is implicit in the United States Supreme Court's recognition that "[m]any state courts have held it improper for the jury to consider or to be informed—through argument or instruction—of the possibility of commutation, pardon or parole." *California v. Ramos*, 463 U.S. 992, 1013 n. 30, 103 S.Ct. 3446, 3460 n. 30, 77 L.Ed.2d 1171, 1188 n. 30 (1983) (quoted in *Robbins*, 319 N.C. at 520, 356 S.E.2d at 311). In other words, the Constitution *permits* such argument or instruction, but it is not constitutionally *required*. *Robbins*, 319 N.C. at 519, 356 S.E.2d at 311.

Argument concerning the effect of consecutive life sentences upon the period of a defendant's incarceration is, in another guise, argument about the legal effect of parole upon defendant's sentence. It is equally irrelevant to a determination of his sentence. The trial court acted correctly in disallowing both arguments.

[22] Defendant also contends that the trial court erred on three occasions during the prosecutor's closing argument by its failure to intervene *ex mero motu* and rectify improprieties to which defendant failed to object. Counsel are allowed wide latitude in arguing hotly contested cases, *State v. Huffstetler*, 312 N.C. at 112, 322 S.E.2d at 123, and the scope of this privilege is left to the sound discretion of the trial court, *id.* Although the appellate court may review an alleged error or impropriety in the State's argument notwithstanding the defendant's failure to flag the error for the trial court, "the impropriety ... must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it." *State v. Artis*, 325 N.C. at 323, 384 S.E.2d at 496 (quoting *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979)).

On the first occasion of which defendant complains, the prosecutor called the jury's attention to defendant's lack of remorse and his unwillingness to admit guilt: "He shows no remorse. He gives no confession. He asks no repentance. He is a stone-cold killer." Defendant contends that because the aggravating circumstance that the murder was heinous, atrocious or cruel was not before the jury, and because defendant had not opened the door to the issue of remorselessness by asserting he felt otherwise, the issue was irrelevant and its mention "exploited" his constitutional right to remain silent or to stand by his plea of not guilty.

[23, 24] An identical argument was proffered by the defendant in *State v. Brown*, 320 N.C. 179, 199–200, 358 S.E.2d 1, 15–16, *cert. denied*, 484 U.S. 970, 108 S.Ct. 467, 98 L.Ed.2d 406 (1987). Although remorselessness is not a statutory aggravating circumstance and may not be argued as such, *see e.g., Brown*, 320 N.C. at 199, 358 S.E.2d at 15, we noted in that case and we note again here that the State never cited this characteristic as an aggravating circumstance to the jury either verbally or on the verdict sheet. *Id.* Moreover, we specifically held in *State v. Artis* that calling the jury's attention to an absence of perceptible remorse does not unconstitutionally "exploit" a defendant's silence at trial or his unwillingness to admit guilt. *Artis*, 325 N.C. at 327, 384 S.E.2d at 498. Urging the jurors to focus on their observation that defendant "shows no remorse" relates to the demeanor displayed by the defendant throughout the trial. Thus "'rooted in' observable evidence," such remarks are not improper. *Id.* at 328, 384 S.E.2d at 498 (quoting *State v. Myers*, 299 N.C. 671, 680, 263 S.E.2d 768, 774 (1980)).

[25] Defendant also maintains that the trial court erred in failing to intervene *ex mero motu* on a second occasion—when the prosecution referred in his closing statement to the rights of the victim and those of her family:

> What about the victim's rights? What about the rights of Brenda Smith? We weren't allowed to bring in a lot of her family and a lot of her friends and show you pictures of Brenda Smith while she was alive or to tell you about her background and what type of person she was and what the value to be placed on her life to society was.

Defendant contends that these words rendered his sentence unconstitutionally unreliable in the same way that victim impact statements introduced to the jury during capital sentencing in *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440, were held to be irrelevant to the sentencing decision and their admission to create "a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." *Id.* at 503, 107 S.Ct. at 2533, 96 L.Ed.2d at 448. The United States Supreme Court has come to similar conclusions regarding a prosecutor's remarks characterizing the victim's personal qualities. *South Carolina v. Gathers*, 490 U.S. ——, 109 S.Ct. 2207, 104 L.Ed.2d 876, *reh'g denied*, —— U.S. ——, 110 S.Ct. 24, 106 L.Ed.2d 636 (1989).

Unlike evidence placed before the jury in *Booth* and *Gathers*, however, the personal qualities of the victim and the devastation wrought upon her family by her death simply were not invoked by the prosecutor's words in this case. It is true that the "rights of the victim" and those of her family are not relevant to the proper focus of sentencing arguments upon the character of the criminal or the circumstances of the crime. *See, e.g., State v. Brown*, 320 N.C. at 202–03, 358 S.E.2d at 17. *See also South Carolina v. Gathers*, 490 U.S. at ——, 109 S.Ct. at 2211, 104 L.Ed.2d at 883. But these issues were the subject of mere allusion by the prosecutor: if improper, the error was *de minimis*. It was well within the trial court's discretion not to intervene and recognize the error *ex mero motu*. *Brown*, 320 N.C. at 203, 358 S.E.2d at 18. Nor does the trial court's failure to intervene imply an abrogation of defendant's constitutional rights, for as we have held in *State v. Artis*, such "mere allusion to the loss the victim's family feels does not threaten to sweep juror ruminations into the realm of the arbitrary and capricious." *Artis*, 325 N.C. at 327, 384 S.E.2d at 498. Given the solid evidentiary foundation for the two aggravating circumstances found by the jury, we hold that any arguable error in the trial court's failure to intervene was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988); *Artis*, 325 N.C. at 327, 384 S.E.2d at 498.

[26] The third occasion upon which defendant alleges the trial court erroneously failed to intervene was during the following portion of the prosecutor's argument:

> Jesus says in the Lord's prayer, "Forgive us our trespasses as we forgive those who trespass against us," but you have no right under the law. And you may forgive trespasses in your personal life, you may forgive those trespasses, but you have no right as a sworn juror in the State of North Carolina to forgive the trespasses against the State of North Carolina. That is to have no part in your deliberations. You cannot forgive the defendant for what he did to Brenda Smith. And your verdict, be it life or be it death, should be no reflection on any sympathy or forgiveness or any religious feelings you have about this case.

Defendant rests his argument solely upon the prosecutor's admonition in the last sentence above that jurors must not allow sympathy to inform their recommendation as to defendant's sentence. These words were not the subject of an objection at trial nor were they included amongst defendant's designated exceptions comprising his assignments of error. Despite his failure to object, defendant contends that the trial court's failure to intervene constituted plain error. N.C.R.App.P. 10(c)(4) (1989); *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). This Court may review such alleged errors when their gravity "amounts to a denial of a fundamental right of the accused." *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 103 S.Ct. 381, 74 L.Ed.2d 513 (1982)).

The scope of this Court's review on appeal, however, "is confined to a considera-

tion of those assignments of error set out in the record on appeal." N.C.R.App.P. 10(a) (1989). Such assignments of error are sufficient only when they "direct the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references." N.C.R.App.P. 10(c)(1) (1989). The assignment of error addressing this argument in defendant's brief does not contain an exception or reference to the transcript or record, and the question raised therefore is not properly before this Court.

Nonetheless, "[i]n capital cases, ... an appellate court may review the prosecution's argument, even though defendant raised no objection at trial," *State v. Brown*, 320 N.C. 179, 194, 358 S.E.2d 1, 13 (1987) (quoting *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979)), and even though an assignment of error may be presented improperly on appeal. *See State v. Chance*, 279 N.C. 643, 657, 185 S.E.2d 227, 236 (1971) ("in capital cases we review the record and *ex mero motu* take notice of prejudicial error"). We thus consider defendant's argument.

Defendant asserts that urging the jury not to rest its verdict upon feeling violates the prohibition in the eighth amendment against cruel and unusual punishment. In *California v. Brown*, 479 U.S. 538, 542, 107 S.Ct. 837, 840, 93 L.Ed.2d 934, 940 (1987), the United States Supreme Court held that it was constitutionally permissible for a trial court to admonish the jury not to be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." The Court reasoned that "mere" indicated to the jury that it was to avoid responding to emotional appeals divorced from an evidentiary basis. According to *Brown*, a defendant's eighth amendment rights are jeopardized only when the jury is urged to ignore such feelings that are supported by facts in the record.

In *State v. Artis* the prosecutor similarly urged the jurors "to try this case without ... prejudice and without sympathy; strictly on the facts of this lawsuit." *Artis*, 325 N.C. at 325, 384 S.E.2d at 497. This Court held that because the apparent import of the prosecutor's words was that "[m]itigating circumstances are to be supported by the evidence, not by emotion," such language did not contravene defendant's rights under the eighth amendment to the United States Constitution. *Id.* at 326, 384 S.E.2d at 497. In the case now before us, the import of the prosecutor's words is even more clear and their propriety thus more apparent than the meaning of the same prosecutorial argument in *Artis*. The context cited by the prosecutor is blatantly not evidence but religious predisposition: the prosecutor was plainly and properly admonishing the jurors that feelings of sympathy and forgiveness rooted in their hearts and not also in the evidence may not be permitted to affect their verdict. In the above argument the prosecutor made absolutely no reference to evidence offered by defendant in mitigation, about which a sympathetic appraisal by jurors may be appropriate. *See State v. Oliver*, 309 N.C. 326, 360, 307 S.E.2d 304, 326 (1983). The prosecutor actually thus avoided the very error of which he is now accused by defendant.

[27] Defendant next contends that the trial court erroneously instructed the jury on the law, improperly emphasizing the significance and weight of the aggravating circumstances. In describing for the jury the significance of aggravating circumstances, the trial court defined such a circumstance as "a fact or group of facts which tend to make a specific murder particularly deserving of the maximum punishment prescribed by law." Defendant terms this definition a gratuitous and prejudicial misstatement of the law because, in his view, it suggests that finding a single aggravating circumstance makes a murder "particularly deserving" of the death penalty, and it does not make clear that the jury must determine that the aggravating circumstance substantially outweighs any mitigating circumstances.

Defendant's strained reading of this portion of the charge is fallacious for several reasons. First, the trial court instructed

the jury according to the pattern jury instruction, N.C.P.I.—Crim. 150.10 (1983), in words virtually identical to those used by the trial court and found proper in *State v. Hutchins*, 303 N.C. 321, 351, 279 S.E.2d 788, 806 (1981). Second, the court did not state an absolute, as defendant suggests, but qualified the statement with the word "tend," which means "to have a leaning, [to] serve, contribute, or conduce in some way or other." Black's Law Dictionary 1315 (rev. 5th ed. 1979). Third, we repeatedly have stated that a jury charge must be construed contextually and that isolated portions of it will not be held prejudicial when the charge as a whole is correct. *E.g., State v. Lee*, 277 N.C. 205, 214, 178 S.E.2d 765, 770 (1970). Finally, the very next sentence in the trial court's charge reiterated and emphasized the qualification, stating: "Our law identifies the aggravating circumstances which may—which might justify a sentence of death." Heard as a whole, these two sentences could not possibly have misled the jury as to the significance of finding an aggravating circumstance.

Defendant adds that the trial court defined a mitigating circumstance as "a fact or group of facts ... which may be considered as extenuating or reducing the moral culpability of the killing or making it less deserving [of] extreme punishment." To say facts "may" be considered in mitigation, defendant avers, is not the equivalent of the trial court's allegedly prejudicial definition of an aggravating circumstance as one that "tends" to make a murder particularly deserving of the death penalty. Thus, defendant insists, the trial court's instruction is a thumb pressing the scales upon which the aggravating circumstances rest. Here defendant tortures syntax to shore an oversubtle argument. We see no distinction of any significance between the two qualifiers; there can be no question that any such nuance was similarly lost on the jury.

[28] Defendant also complains of the following language in the trial court's charge illustrating the process of weighing aggravating against mitigating circumstances in deciding upon recommending the imposition of the death penalty:

> After considering the totality of the aggravating and mitigating circumstances, you must be convinced beyond a reasonable doubt that the imposition of the death penalty is justified and appropriate in this case before you can answer the issue yes.
>
> In so doing, you are not applying a mathematical formula. For example, three circumstances of one kind do not automatically and of necessity outweigh one circumstance of another kind. The number of circumstances found is only one consideration in determining which circumstance outweighs others or in determining which circumstances outweigh others.
>
> You may very properly emphasize one circumstance more than another in a particular case. You must consider the relative substantiality and persuasiveness of the existing aggravating and mitigating circumstances in making this determination.

Defendant asserts that the trial court's example reinforced the emphasis upon aggravating circumstances that he perceives in other portions of the charge. Again, we disagree. These words are taken directly from the pattern jury instructions, N.C.P.I. —Crim. 150.10 (1983), and mirror the language set out by this Court in *State v. McDougall*, 308 N.C. 1, 34-35, 301 S.E.2d 308, 327-28, *cert. denied*, 464 U.S. 865, 104 S.Ct. 197, 78 L.Ed.2d 173 (1983), as "an example of appropriate instructions" on the issue of according weight to aggravating and mitigating circumstances. Read as a whole, the trial court's charge indicates no perceptible emphasis on aggravating over mitigating circumstances. We hold that defendant's contentions otherwise are meritless.

[29, 30] The last of the errors alleged to have occurred during the penalty phase of defendant's trial concerns the period of the jury's deliberations. The trial court noted that the jury had deliberated from 2:55 until 5:00 p.m. the first day, and from 9:30 until 11:20 a.m. the next. At this point the

foreman informed the trial court: "We're hung." The court then stated that after a recess it would instruct the jury from N.C.G.S. § 15A-1235 and allow the jury some additional time for deliberations. Defendant's subsequent objection was overruled, and his motion that the trial court recognize the jury's inability to reach a verdict and impose a life sentence as permitted by N.C.G.S. § 15A-2000(b) was denied. After a brief recess the trial court instructed the jury as follows:

> Members of the jury, I am going to ask that you resume your deliberations in an attempt to return a recommendation. I have already instructed you that your recommendation must be unanimous, that is, each of you must agree on the recommendation. I shall give you these additional instructions.
>
> First, it is your duty to consult with one another and to deliberate with a view to reaching a recommendation if it can be done without violence to individual judgment.
>
> Second, each of you must decide the case and your recommendation for yourself, but only after an impartial consideration of the evidence with your fellow jurors.
>
> Third, in the course of your deliberations you should not hesitate to reexamine your own views and change your opinion if you become convinced it is erroneous. On the other hand, you should not hesitate to hold to your own views and opinions if you remain convinced they are correct.
>
> Fourth, none of you should surrender an honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a recommendation.
>
> Please be mindful that I am in no way trying to force or coerce you to reach a recommendation. I recognize the fact that there are sometimes reasons why jurors cannot agree. Through these additional instructions I have just given you, I merely want to emphasize that it is your duty to do whatever you can to reason the matter over together as reasonable people and to reconcile your differences if such is possible without the surrender of conscien[t]ious conviction to reach a recommendation.

The jury resumed its deliberations at 11:47 a.m. and returned to the courtroom at 12:45 p.m. with the unanimous recommendation that the trial court sentence the defendant to death. The jury's recommendation was based upon its finding a single mitigating circumstance, which it concluded was not sufficiently substantial to outweigh the two aggravating circumstances it found. Defendant contends that, despite the trial court's stated effort not to force the jurors to a verdict, the effect of its requiring them to resume deliberations after what defendant avers was a "reasonable time" was coercive.

Defendant apprehends a similarity between the trial court's reiterated admonition that the jury's verdict must be unanimous here and a charge in *State v. Smith*, 320 N.C. 404, 358 S.E.2d 329 (1987), which this Court concluded had the probable effect of coercing a recommendation of death. Defendant is mistaken: the circumstances of this charge suggest no parallel with the unique facts in *Smith*. In that case the jury, having been instructed previously that a unanimous recommendation of death would result in a sentence of death and a unanimous recommendation of life in prison would result in a sentence of life imprisonment, returned after three hours of deliberations and asked: "If the jurors' decision is not unanimous, is this automatic life imprisonment or does the jury have to reach a unanimous decision regardless?" *Smith*, 320 N.C. at 420, 358 S.E.2d at 338. This Court stressed that "*[i]n the context of the jury's inquiry*, the instructions probably were misleading and probably resulted in coerced unanimity." *Id.* at 422, 358 S.E.2d at 339.

The context of the trial court's instructions in the case *sub judice*, however, differs radically from that in *Smith*. The instructions were not prompted by a question concerned with the requisite of unanimity. The trial court deliberately stated

that it was "in no way trying to force or coerce [the jurors] to reach a recommendation," and urged them to "reconcile [their] differences *if such is possible* without the surrender of [their] conscien[t]ious conviction[s]" (emphasis added). The lesson in *Smith* is that, in telling a jury that its recommendation as to punishment must be unanimous, the trial court must be vigilant to inform the jurors that whatever recommendation they *do* make must be unanimous and not to imply that a recommendation *must* be reached. The context of the trial court's instruction in this case patently falls within the former category, and in such a context, reminding the jury that its findings and recommendations must be unanimous is perfectly proper.

The provisions governing capital punishment state: "If a jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment." N.C.G.S. § 15A-2000(b) (1988). This Court has noted frequently that "what constitutes a 'reasonable time' for jury deliberation in the sentencing phase should be left to the trial court's discretion." *E.g., State v. Johnson*, 298 N.C. at 370, 259 S.E.2d at 782. This is so because "the trial judge is in the best position to determine how much time is reasonable under the facts of a specific case." *State v. Kirkley*, 308 N.C. 196, 221, 302 S.E.2d 144, 158 (1983). In *Kirkley* the jury's deliberations spanned seven and one-half hours, during which time it was interrupted twice for meals and twice for further instructions. Its deliberations included the contemplation of fourteen mitigating circumstances and one aggravating circumstance, and it was required to make sentencing recommendations for two separate murder convictions. This Court concluded that requiring the jury to resume deliberations was within the trial court's discretion under the circumstances: "We cannot say from the facts of this case that the trial judge abused his discretion by refusing to impose a life sentence in each capital case on the basis that the jury could not reach a unanimous sentence recommendation within a reasonable time period." *Kirkley*, 308 N.C. at 221, 302 S.E.2d at 158. In *Johnson* the jury deliberated for three hours and thirty-nine minutes before it announced that it could not reach a verdict. This Court held that it could not agree with the defendant that this period was unreasonable and held that the trial court had not abused its discretion in coming to the same conclusion.

Here the jurors had before them two aggravating circumstances and ten mitigating circumstances. They had deliberated these issues and the question of a sentencing recommendation for nearly four hours over a period of two days. The trial judge heard all the evidence in support of mitigating and aggravating circumstances, observed the jurors' demeanor, and instructed them according to the law as he determined necessary to their comprehension of their duty as jurors. He was thus "in the best position to determine how much time [was] reasonable" for the jurors' deliberations regarding a recommendation for punishment under the facts of this case. *State v. Kirkley*, 308 N.C. at 221, 302 S.E.2d at 158. We hold that in the context of these facts, the trial court did not abuse its discretion in instructing the jury according to the law and in requesting it to resume its deliberations.

PRESERVATION ISSUES

Defendant attempts to resuscitate several issues upon which this Court recently has ruled. As defendant proffers no new or convincing reason to question these holdings, we reject the following contentions on the authority of the cited case law:

[31] Requiring a jury unanimously to find mitigating circumstances does not violate a defendant's eighth amendment rights. *State v. McKoy*, 323 N.C. 1, 30–42, 372 S.E.2d 12, 27–36 (1988), *cert. granted*, — U.S. —, 109 S.Ct. 1117, 103 L.Ed.2d 180 (1989).

[32] Informing the jury of its "duty" to return a recommendation of death when it finds mitigating circumstances insufficient to outweigh aggravating circumstances and the latter sufficiently substantial to call for the death penalty passes constitu-

tional muster. *E.g., State v. Artis*, 325 N.C. at 336, 384 S.E.2d at 503; *State v. McDougall*, 308 N.C. at 34, 301 S.E.2d at 327–28.

Excusing for cause jurors who have stated opposition to the death penalty was held constitutionally permissible in *Lockhart v. McCree*, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986), and by this Court in *State v. Oliver*, 309 N.C. at 337, 307 S.E.2d at 313, and more recently in *State v. Artis*, 325 N.C. at 336, 384 S.E.2d at 503–04, and *State v. McNeil*, 324 N.C. 33, 57, 375 S.E.2d 909, 923 (1989).

Placing the burden on defendant to prove each mitigating circumstance by a preponderance of the evidence and not conversely requiring the State to prove the nonexistence of each proffered mitigating circumstance beyond a reasonable doubt was held constitutional in, *e.g., State v. Barfield*, 298 N.C. 306, 354, 259 S.E.2d 510, 544 (1979), *cert. denied*, 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed.2d 1137, *reh'g denied*, 448 U.S. 918, 101 S.Ct. 41, 65 L.Ed.2d 1181 (1980).

Finally, defendant urges this Court to reverse its holding, stated in, *e.g., State v. Barfield*, 298 N.C. at 354, 259 S.E.2d at 544, that the present death penalty statutes, N.C.G.S. § 15A-2000 through -2003, are constitutional. We again decline this invitation for the reasons stated in that case and its progeny.

PROPORTIONALITY REVIEW

[33] Having concluded that no prejudicial error marred the guilt or sentencing phase of defendant's trial, it is this Court's statutory responsibility to ascertain that the death penalty in this case was imposed neither arbitrarily nor capriciously. N.C.G.S. § 15A-2000(d)(2) (1988). This assessment entails determining (1) whether the record supports the aggravating circumstances found by the jury, (2) whether the sentence was imposed under the influence of passion, prejudice, or some other arbitrary factor, and (3) whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. *State v. Artis*, 325 N.C. at 337, 384 S.E.2d at 504; *State v. Williams*, 308 N.C. 47, 79, 301 S.E.2d 335, 355, *cert. denied*, 464 U.S. 865, 104 S.Ct. 202, 78 L.Ed.2d 177, *reh'g denied*, 464 U.S. 1004, 104 S.Ct. 518, 78 L.Ed.2d 704 (1983).

Cognizant that this statutory responsibility is as serious as any an appellate court must shoulder, *e.g., State v. Jackson*, 309 N.C. 26, 46, 305 S.E.2d 703, 717 (1983), we have undertaken a sober and scrupulous review of the record, transcripts, exhibits and arguments presented in the briefs and orally. This scrutiny has revealed to us that the record fully supports the jury's finding of the two aggravating circumstances submitted. It has further revealed no prejudicial, impermissibly emotional or other arbitrary influence upon the jury's recommendation or upon the trial court's imposition of the sentence of death.

[34, 35] Proportionality review entails comparing this case to all cases arising since 1 June 1977 that have been tried as capital cases and that have been affirmed as to both phases of the trial by this Court after appellate review. *Jackson*, 309 N.C. at 45, 305 S.E.2d at 717 (quoting *State v. Williams*, 308 N.C. at 79, 301 S.E.2d at 355). This includes not only a reappraisal of the relative weight of aggravating and mitigating circumstances, but also a scrutiny of the entire record for all the circumstances of the case, including the manner of the commission of the crime and the defendant's character, background, and mental and physical condition. *State v. Artis*, 325 N.C. at 338, 384 S.E.2d at 505; *State v. McLaughlin*, 323 N.C. 68, 109, 372 S.E.2d 49, 75 (1988). We do not feel compelled to cite every case consulted. *E.g., State v. Artis*, 325 N.C. at 338, 384 S.E.2d at 505.

[36] The two aggravating circumstances submitted to and found by the jury were that defendant had been previously convicted of a felony involving the use or threat of violence to the person, N.C.G.S. § 15A-2000(e)(3), and that the murder of Brenda Smith had occurred as part of a course of violent conduct by defendant, N.C.G.S. § 15A-2000(e)(11). Ten mitigat-

ing circumstances were submitted to the jury, but it found only one to exist—that defendant's family had a history of mental illness. The jury specifically rejected mitigating circumstances that defendant was under the influence of mental illness or emotional disturbance and that his capacity to conform his conduct to the requirements of the law was impaired by manic depression, schizophrenic illness, emotional instability, drug abuse, drug-induced mental illness, or mixed personality disorder. The testimony of certain witnesses for the defense supported the submission of these mitigating circumstances to the consideration of the jury, but it was "the jury's duty to decide what to believe," *State v. McKoy*, 323 N.C. at 29, 372 S.E.2d at 27 (quoting *State v. Smith*, 305 N.C. 691, 705–06, 292 S.E.2d 264, 273–74, *cert. denied*, 459 U.S. 956, 103 S.Ct. 474, 74 L.Ed.2d 622 (1982)); it is not the duty of this Court. "Determining the credibility of evidence is at the heart of the fact-finding function." *Id.* (quoting *State v. Jones*, 309 N.C. 214, 220, 306 S.E.2d 451, 456 (1983)).

It is useful in proportionality review to compare the case under scrutiny to three clusters of cases in the pool—those cases resulting in a sentence of life imprisonment in which the same aggravating circumstances occurred, those "death affirmed" cases in which the same aggravating circumstances occurred, and those cases in which this Court has found the death sentence disproportionate. In so doing, it becomes apparent whether the sentence imposed in the case *sub judice* is disproportionate or excessive, or whether it appears to be appropriate given the general parameters of cases to which it is factually akin.

The single characteristic distinguishing the first two classes of cases from the last is the fact that the defendant has killed more than once. We have remarked before, and it bears repeating, that this Court has never found disproportionality in a case in which the defendant was found guilty for the death of more than one victim. This Court has found the death sentence disproportionate in seven cases. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds, State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Boudurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); and *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). In none of these cases was the defendant convicted of more than one murder.

State v. McNeil, 324 N.C. at 59–60, 375 S.E.2d at 925.

There are, however, a number of cases in the group of those where death sentences were affirmed on appellate review, in which the defendant has taken the life of more than one victim. Many of these appear distinguishable from the case before us by the presence of the aggravating circumstance that the murder committed was especially heinous, atrocious or cruel. N.C.G.S. § 15A-2000(e)(9) (1988). *See, e.g., State v. Huff*, 325 N.C. 1, 381 S.E.2d 635 (1989); *State v. McNeil*, 324 N.C. 33, 375 S.E.2d 909; *State v. McLaughlin*, 323 N.C. 68, 372 S.E.2d 49; *State v. McDowell*, 301 N.C. 279, 271 S.E.2d 286 (1980), *cert. denied*, 450 U.S. 1025, 101 S.Ct. 1731, 68 L.Ed.2d 220, *reh'g denied*, 451 U.S. 1012, 101 S.Ct. 2350, 68 L.Ed.2d 865 (1981).

Nevertheless, a number of other cases in the pool share the characteristic of a multiple murder with the case before us. In *State v. Robbins*, 319 N.C. 465, 356 S.E.2d 279, the jury found not only the prior violent felony aggravating circumstance, N.C.G.S. § 15A-2000(e)(3), but also that the murder for which the defendant was on trial had been committed while the defendant was engaged in committing a robbery, N.C.G.S. § 15A-2000(e)(5). Although the jury found in mitigation that defendant had been under the influence of a mental or emotional disturbance at the time of the murders and that his capacity to appreciate the criminality of his acts had been impaired, this Court concluded that it was "clear from his convictions of premeditated and deliberate murder that human life meant little to Robbins." *Robbins*, 319

N.C. at 529, 356 S.E.2d at 316. This Court did not fail to note the gravity of the aggravating circumstance that *Robbins* shares with this case: "A heavy factor against Robbins is that he is a multiple killer." *Id.*

In *State v. McKoy*, 323 N.C. 1, 372 S.E.2d 12, the single aggravating circumstance found by the jury in addition to the prior violent felony circumstance was that the murder was committed against a deputy sheriff while engaged in the performance of his official duties. N.C.G.S. § 15A-2000(e)(8) (1988). The jury found two circumstances in mitigation. This Court noted with regard to the earlier murder supporting the prior violent felony circumstance that this "unlawful killing of another human being with malice . . . was . . . among the most serious of the many felonies 'involving the use or threat of violence to the person.'" *McKoy*, 323 N.C. at 48, 372 S.E.2d at 38 (citations omitted).

A third analogous case in which a prior conviction for murder was before the jury as an aggravating circumstance was *State v. Cummings*, 323 N.C. 181, 372 S.E.2d 541 (1988). This is the only case in the proportionality pool in which the second killing was designated as "another capital felony" under N.C.G.S. § 15A-2000(e)(2). *Cummings*, 323 N.C. at 197, 372 S.E.2d at 552. The Court remarked upon the unique status of the two aggravating circumstances (e)(2) and (e)(3) as being the only circumstances that "reflect upon a defendant's character as a recidivist," *id.*, and cited the following three cases in addition to those described above, in which the defendant had been convicted of a prior violent felony resulting in the victim's death: *State v. McLaughlin*, 323 N.C. 68, 372 S.E.2d 49 (previous conviction of involuntary manslaughter); *State v. Taylor*, 304 N.C. 249, 283 S.E.2d 761 (1981), *cert. denied*, 463 U.S. 1213, 103 S.Ct. 3552, 77 L.Ed.2d 1398, *reh'g denied*, 463 U.S. 1249, 104 S.Ct. 37, 77 L.Ed.2d 1456 (1983) (previous conviction of murder in the first degree); *State v. McDowell*, 301 N.C. 279, 271 S.E.2d 286 (previous conviction of murder in the second degree). In three of the four cases cited in *Cummings* some mitigating circumstances had been found; in *Cummings* the jury found none.

The Court distinguished *Cummings* from *State v. Withers*, 311 N.C. 699, 319 S.E.2d 211 (1984), in which a multiple murder occurred yet the defendant received a sentence of life imprisonment. In *Withers* the defendant shot and killed his fiancee's twelve-year-old daughter after an argument concerning her accusations of sexual abuse, then shot his fiancee and himself. Sixteen years before, he had been convicted of murder in the first degree, and he had been paroled after serving thirteen years in prison for that crime. The jury found the same two aggravating circumstances in *Withers* as were found in the case before us—that defendant had previously been convicted of a violent felony and that the murder was part of a course of violent conduct. In *Withers*, however, the jury also found one or more of the ten mitigating circumstances submitted.[4] The Court in *Cummings* found *Withers* distinguishable from the other cases in which a multiple murder underlay the jury's finding of a prior violent felony or other capital felony because of this "substantial mitigation." *State v. Cummings*, 323 N.C. at 196, 372 S.E.2d at 553. A similar distinction applies to the case now before us: although a single mitigating circumstance was found by the jury—that defendant's family had a history of mental illness—this was not "substantial mitigation" underlying the appropriateness of a life sentence. Rather, compared to the number and significance of the circumstances the jury specifically rejected, its mitigating effect appears slight.

In *State v. McNeil*, 324 N.C. 33, 60, 375 S.E.2d 909, 925, this Court noted three other cases involving multiple murders in which the juries returned life sentences:

4. Because the jury there failed to specify which of the ten mitigating circumstances applied, we must assume for purposes of proportionality review that all ten circumstances were found.

State v. Lawson, 310 N.C. 632, 648, 314 S.E.2d 493, 503 (1984), *cert. denied*, 471 U.S. 1120, 105 S.Ct. 2368, 86 L.Ed.2d 267 (1985).

State v. King, 316 N.C. 78, 340 S.E.2d 71 (1986); *State v. Whisenant*, 308 N.C. 791, 303 S.E.2d 784 (1983); and *State v. Crews*, 294 N.C. 607, 252 S.E.2d 745 (1979). The killings in each of these cases, however, appear less heinous than the deliberate, senseless, sequential murders that underlay this defendant's sentence of death, both of which resulted in convictions of murder in the first degree. In *King*, the defendant shot into the house where his former girlfriend was hiding, killing not the girlfriend, but her mother and sister. He was convicted of murder in the first degree on the basis of felony murder, not on the basis of premeditation and deliberation. In *Whisenant*, the defendant was convicted of murder in the first degree of an elderly man, but only of murder in the second degree of the victim's housekeeper. In *Crews*, two victims died when the defendants lured them to their campsite, but each died at the hands of a different defendant.

It is readily apparent that the facts and circumstances surrounding defendant's murder of Brenda Smith reveal a very different kind of killing than those in the cases in which the jury returned a sentence of life. Defendant was a man who admitted to a cellmate that he had been dating too many women and suffering too much pressure, causing him to feel he had to "eliminate" somebody. With this end in mind he murdered Joan Brady by ligature strangulation, a torturous mode of death that, like manual strangulation, is a prolonged process "during which the victim's life is quite literally in the hands of the assailant [and] . . . the victim is rendered helpless, aware of impending death, but utterly incapable of preventing it." *State v. Artis*, 325 N.C. at 319, 384 S.E.2d at 493. Two days later defendant took the life of Brenda Smith in exactly the same way. That night he ignited the house of a third girlfriend, intending for her and her young son to burn to death in the fire. These grossly excessive attempts to disentangle himself from overabundant romantic commitments, followed shortly after by an evening of threatening and terrorizing his uncle, were so depraved as graphically to demonstrate a callous disregard for the value of human life." *State v. Cummings*, 323 N.C. at 199, 372 S.E.2d at 553. Worse, the murders and attempted murder of girlfriends—women who had cared for and been intimate with defendant and who at the time of defendant's assault upon them had no apparent quarrel with him—were "especially cold-blooded because of the absence of any motive of the sort which is usually powerful enough to cause one human being to destroy another." *State v. Greene*, 321 N.C. 594, 614-15, 365 S.E.2d 587, 599, *cert. denied*, — U.S. —, 109 S.Ct. 247, 102 L.Ed.2d 235 (1988).

We have scrupulously reviewed the record and measured defendant's contentions of error in both the guilt phase and the penalty phase of his trial against the law. We conclude that no prejudicial error tainted either phase. Our careful and comprehensive review of other capital cases arising since 1 June 1977 reveals that the facts and circumstances of defendant's crime and character are more like those in similar cases in which a sentence of death has been affirmed than like those in cases in which the perpetrator received a sentence of life imprisonment. We thus cannot hold that the sentence of death recommended by the jury and imposed by the trial court in this case is disproportionate or excessive as a matter of law.

NO ERROR.

FRYE, Justice, concurring in result.

One of the preservation issues raised by defendant relates to the applicability of the United States Supreme Court's decision in *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), to the unanimity requirement for mitigating circumstances in determining whether death is the appropriate punishment in a given case. This issue is now pending before the Supreme Court of the United States. *See State v. McKoy*, 323 N.C. 1, 372 S.E.2d 12 (1988), *cert. granted*, — U.S. —, 109 S.Ct. 1117, 103 L.Ed.2d 180 (1989). While I believe that *Mills* is applicable to North Carolina, *see State v. Lloyd*, 321 N.C. 301, 364 S.E.2d 316, *vacated and remanded on*

other grounds, — U.S. —, 109 S.Ct. 38, 102 L.Ed.2d 18, *reinstated*, 323 N.C. 622, 374 S.E.2d 277 (1988), Exum, C.J., and Frye, J., dissenting, assuming error arguendo, I would find the error nonprejudicial under the peculiar circumstances of this case.

326 N.C. 259

STATE of North Carolina

v.

Edward Luther HOLLEY.

No. 131A88.

Supreme Court of North Carolina.

Feb. 7, 1990.

Defendant was convicted in the Superior Court, Chowan County, Charles B. Winberry, J., of first-degree sexual offense, and defendant appealed. The Supreme Court, Mitchell, J., held that: (1) it was not plain error to fail to instruct the jury that it could not convict defendant unless it found that defendant penetrated victim's vagina with his tongue or with his finger, and (2) the life sentence did not constitute cruel and unusual punishment.

No error.

1. Criminal Law ⇐1038.1(2)

Even in absence of objection at trial, Supreme Court may review trial court's jury charge for plain error; before deciding that instruction amounts to plain error, however, Supreme Court must be convinced that absent error jury probably would have reached different verdict. Rules App.Proc., Rule 10(b)(2).

2. Criminal Law ⇐1038.2

In first-degree sexual offense prosecution in which jury was instructed that sexual act means any penetration, however slight, by object into genital opening of person's body, it was not plain error to fail to instruct jury that it could not convict defendant unless it found that defendant penetrated victim's vagina with his tongue or his finger; court was not convinced that results of trial would have been different had trial court given that instruction.

3. Criminal Law ⇐1213.8(3)

Life sentence for first-degree sexual offense does not violate federal and state prohibitions against imposition of cruel and unusual punishment. U.S.C.A. Const. Amend. 8.

Lacy H. Thornburg, Atty. Gen., by Debra C. Graves, Associate Atty. Gen., Raleigh, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender by Mark D. Montgomery, Asst. Appellate Defender, Raleigh, for defendant.

MITCHELL, Justice.

The defendant was tried and convicted on a proper bill of indictment charging him with one count of first-degree sexual offense. The trial court entered a sentence of life in prison for that offense. On appeal the defendant contends that the trial court's jury instructions were defective and that the sentence of life for a sexual crime is cruel and unusual punishment. We do not agree.

At trial the State's evidence tended to show that during the evening of 10 October 1986 and the early morning of 11 October 1986, the defendant, age thirty-three, committed sexual acts on the ten-year-old victim. The victim, the defendant's stepdaughter, testified that at different times on those dates the defendant placed his finger and his tongue inside her vagina. She testified that she cried during both encounters.

The victim's mother testified that the defendant, her husband, took advantage of the victim. She testified that the defendant had the victim place her vagina on his mouth. At another time, the defendant put his "finger in her [the victim's] dress...."

On 13 October 1986, Officer Gregory Bonner, of the Edenton Police Department,

IN THE SUPREME COURT OF NORTH CAROLINA

No. 585A87 — Person County

State of North Carolina

v

Ricky Lee Price

JUDGMENT

This cause came on to be argued upon the transcript of the record from the Superior Court, Person County. Upon consideration whereof, this Court is of the opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable Willis P. Whichard, Associate Justice, be certified to the said Superior Court to the intent that proceedings be had therein in said cause according to law as declared in said opinion.

And it is considered and adjudged further, that the defendant do pay the costs of the appeal in this Court incurred, to wit, the sum of Five Hundred Four and 40/100 dollars ($504.40), and execution issue therefor.

Certified to the Superior Court, Person County, this 27th day of February, 1990.

A TRUE COPY

J. GREGORY WALLACE
Clerk of the Supreme Court

By: Peggy N. Byrd
Assistant Clerk

A TRUE COPY
CLERK OF THE SUPREME COURT
OF NORTH CAROLINA
By: Gayle W. Stakeman
DEPUTY CLERK
13 October 1992

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

October 1, 1990

Mr. Gordon Widenhouse
Assistant Appellate Defender
P. O. Box 1070
Raleigh, NC 27602

Re: Ricky Lee Price
v. North Carolina
No. 90-5045

Dear Mr. Widenhouse:

The Court today entered the following order in the above entitled case:

The motion for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of North Carolina for further consideration in light of McKoy v. North Carolina, 494 U. S. ------ (1990).

Very truly yours,

Joseph F. Spaniol, Jr., Clerk

S

with Division (2) of
pinion.
ith direction.

nd ANDREWS, J.,

STATE of North Carolina,
v.
Ricky Lee PRICE.
No. 585A87.
Supreme Court of North Carolina.
June 25, 1992.

Defendant was convicted in the Superior Court, Person County, Robert H. Hobgood, J., of first-degree murder and was sentenced to death. Defendant appealed. The Supreme Court, 326 N.C. 56, 388 S.E.2d 84, affirmed. On petition for writ of certiorari, the United States Supreme Court, 111 S.Ct. 29, vacated and remanded case for further consideration. The Supreme Court, Exum, C.J., held that: (1) erroneous instruction requiring jury to find existence of mitigating circumstance unanimously before any juror could consider that circumstance in determining defendant's sentence was not prejudicial in light of poll of individual jurors establishing that each mitigating circumstance that was rejected was rejected unanimously; (2) motion for appropriate relief could not be used to raise contentions that trial court erred in failing to submit both prongs of impaired capacity mitigating circumstance and in refusing to submit as nonstatutory mitigating circumstance defendant's ongoing sentence of life imprisonment for another murder; (3) trial court's error in failing to submit mitigating circumstance of defendant's diminished capacity to appreciate criminality of his conduct was not prejudicial; and (4) that defendant was currently serving life sentence for another unrelated crime was not mitigating circumstance which trial court was required to submit to jury.

Death sentence affirmed; mandate reinstated, and case remanded.

1. Criminal Law ⇐1172.9

Trial court's erroneous instruction in capital murder case that jury must find existence of mitigating circumstance unanimously before any juror could consider that circumstance in determining whether to recommend death penalty was harmless where polling of each individual juror established that jury was unanimous in rejecting each mitigating circumstance not found to exist, even though there was evidence which supported several mitigating circumstances not found by jury and jury foreman was not polled as to jury's group responses. U.S.C.A. Const.Amends. 8, 14.

2. Criminal Law ⇐874

Polling each individual juror in capital murder case as to their individual verdict by asking "is this your answer" following recitation of each mitigating circumstance was not ambiguous, despite defendant's contention that juror might have understood the word "your" to refer to jury as whole; reasonable juror would understand that if he or she were being questioned individually, question was referring to him or her as individual juror.

3. Criminal Law ⇐1159.5

Jury verdict unanimously rejecting mitigating circumstances cannot be disturbed simply because evidence would have permitted reasonable juror to find otherwise.

4. Criminal Law ⇐749

Unless evidence entitles defendant to peremptory instruction, it is jury's province to accept or reject evidence of mitigating circumstances.

5. Criminal Law ⇐998(11)

Defendant's contention that trial court erred in failing to submit both prongs of impaired capacity mitigating circumstance for jury's consideration and refusing to submit as a nonstatutory mitigating circumstance defendant's ongoing sentence of life imprisonment for another murder conviction could not be raised in motion for appropriate relief filed after original appeal. G.S. §§ 15A-1415(b)(3, 7, 8), 15A-1418(b), 15A-1419(b), 15A-2000(f)(6).

6. Criminal Law ⇐998(2)

Motions for appropriate relief may not be used to add new arguments to appeal which could have been raised in briefs orig-

inally filed. G.S. §§ 15A-1415, 15A-1418, 15A-1419.

7. Homicide ⇐311

When evidence was presented in capital murder case which supported statutory mitigating circumstance that capacity of defendant to appreciate criminality of his conduct or conform his conduct to requirements of law was impaired, trial court was mandated to submit both aspects of that circumstance to jury for its consideration, even though defendant's counsel made affirmative, tactical request that trial court not submit defendant's diminished capacity to appreciate criminality of his conduct and counsel stated reasons for request on record. G.S. § 15A-2000(f)(6).

8. Criminal Law ⇐1208.1(6)

Test for sufficiency of evidence to support submission of statutory mitigating circumstances in capital case is whether jury could reasonably find that circumstance exists based on evidence.

9. Criminal Law ⇐494

Psychologist's testimony that defendant suffered from mental illness that impaired his ability to make judgments, have appropriate mood responses, and be in touch with reality, considered with other evidence of defendant's past psychiatric problems resulting in hospitalization, would allow reasonable inference that defendant's capacity to appreciate criminality of his conduct was impaired, so as to require that trial court submit to jury defendant's capacity to appreciate criminality of his conduct. G.S. § 15A-2000(f)(6).

10. Homicide ⇐343

Trial court's erroneous failure to submit to jury in capital case the mitigating circumstance that defendant's capacity to appreciate criminality of his conduct was impaired was not prejudicial, where jury unanimously rejected other mitigating circumstances resting on same evidence dealing with defendant's mental illnesses and substance abuse.

11. Homicide ⇐357(4)

That capital murder defendant was currently serving life sentence for another unrelated crime was not mitigating circumstance which tended to justify sentence less than death; thus, trial court was not required to submit "the additional protection to society" possibly achieved by defendant's incarceration under the life sentence as mitigating circumstance.

On remand from the Supreme Court of the United States. Heard in the Supreme Court 10 April 1991. Additionally, on defendant's motion for appropriate relief filed in the Supreme Court on 30 April 1991, pursuant to N.C.G.S. § 15A-1418.

Lacy H. Thornburg, Atty. Gen. by Barry S. McNeill, Sp. Deputy Atty. Gen., Raleigh, for State.

Malcolm Ray Hunter, Jr., Appellate Defender by Gordon Widenhouse, Asst. Appellate Defender, Raleigh, for defendant-appellant.

EXUM, Chief Justice.

Defendant, after being convicted of the first-degree murder of Brenda Smith, was sentenced to death. On defendant's appeal this Court found no prejudicial error in either the guilt determination proceeding or the capital sentencing proceeding. *State v. Price*, 326 N.C. 56, 388 S.E.2d 84 (1990) (*Price I*).

On 1 October 1990 the Supreme Court of the United States vacated our judgment and remanded the case to us for further consideration in light of *McKoy v. North Carolina*, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990). *Price v. North Carolina*, — U.S. —, 111 S.Ct. 29, 112 L.Ed.2d 7 (1990).

We again heard the case on supplemental briefs ordered by the Court and directed to the questions whether under *McKoy* there was error in the sentencing proceeding and, if so, whether the error was harmless. We conclude that although there was *McKoy* error, the error was harmless beyond a reasonable doubt.

We also deny defendant's motion for appropriate relief assigning error to the trial court's failure to submit two mitigating

circumstances to the jury. Although the trial court erred in not submitting one statutory mitigating factor, we conclude that error was harmless beyond a reasonable doubt.

The evidence is adequately summarized in *Price I* and will not be repeated here, except as necessary for our consideration of the issues raised in this appeal.

I.

In *McKoy* the United States Supreme Court held that capital sentencing jury instructions requiring the jury to find the existence of a mitigating circumstance unanimously before any juror could consider that circumstance in determining a defendant's sentence violated the Eighth and Fourteenth Amendments to the Federal Constitution. It is undisputed that the jury here received the unanimity instruction found unconstitutional in *McKoy*. The trial court instructed the jury to answer each mitigating circumstance "no" if it did not unanimously find the circumstance to exist by a preponderance of the evidence. The only issue remaining is whether this is the "rare case in which a *McKoy* error could be deemed harmless." *State v. McKoy*, 327 N.C. 31, 44, 394 S.E.2d 426, 433 (1990). Because this error is one of constitutional dimension, the State has the burden of showing the error was harmless beyond a reasonable doubt. *Id.; see also* N.C.G.S. § 15A-1443(b) (1988). For reasons explained below, we conclude that the State has met its burden.

The State's evidence tended to show that defendant strangled Brenda Smith to death and left her body in a wooded area in the Hurdle Mills community of rural Person County. A pathologist testified that the victim died of ligature strangulation with "something broad." She and defendant had been dating. Less than three days before Brenda Smith's body was found, defendant strangled Joan Brady to death in Danville, Virginia. Defendant had also been romantically involved with her. An inmate with whom defendant had been incarcerated pending trial testified that defendant admitted killing both women, saying he had been dating too many women and felt he had to eliminate somebody. Before the trial from which he now appeals, defendant was convicted by a Virginia court of murder in Joan Brady's death and received a life sentence.

Evidence for the State further tended to show that the day after Brenda Smith's body was found, defendant set fire to the house of another female acquaintance with knowledge that she was in the house at the time. Later that day, defendant bound and gagged his uncle, attempted to set the uncle afire with lighter fluid, held the uncle and another man at knifepoint in a basement, and held police at bay for several hours before surrendering.

In the sentencing proceeding, the jury found two aggravating circumstances in Brenda Smith's murder: Defendant previously had been convicted of a felony involving violence to another person, and defendant murdered Brenda Smith in a course of conduct involving the threat of violence to another person. Defendant disputed the submission of the course of conduct circumstance, and this court upheld that submission in *Price I*, 326 N.C. at 83, 388 S.E.2d at 99.

The trial court submitted ten mitigating circumstances:

(1) the murder was committed while defendant was under the influence of mental or emotional disturbance;

(2) the capacity of defendant to conform his conduct to the requirements of the law was impaired by low intelligence;

(3) the capacity of defendant to conform his conduct to the requirements of the law was impaired by manic-depressive illness;

(4) the capacity of defendant to conform his conduct to the requirements of the law was impaired by schizophrenic illness;

(5) the capacity of defendant to conform his conduct to the requirements of the law was impaired by emotional instability;

(6) the capacity of defendant to conform his conduct to the requirements of the law was impaired by drug abuse;

(7) the capacity of defendant to conform his conduct to the requirements of the law was impaired by drug-induced mental illness;

(8) the capacity of defendant to conform his conduct to the requirements of the law was impaired by mixed personality disorder;

(9) the defendant's family has a history of mental illness or emotional disturbance;

(10) Any other circumstance or circumstances arising from the evidence which the jury deemed to have mitigating value.

The jury unanimously found only one of the ten circumstances, number (9), the history of mental illness or emotional disturbance in defendant's family. After finding that circumstance insufficient to outweigh the aggravating circumstances, and finding the aggravating circumstances sufficiently substantial to warrant the death penalty when considered with the mitigating circumstance found, the jury unanimously recommended that defendant be sentenced to death.

Upon return of its sentencing verdict in open court, the jury was polled about each answer on the verdict form, including the mitigating circumstances not found. First, the jury was polled as a whole to confirm each answer on the verdict sheet. Then, each juror was polled individually under the following procedure:

The Court: Now, under the statute, Madam Clerk, you will poll the jury individually. You will poll them as to their recommendation.

Defense Counsel: We would ask that the entire series of questions be asked, Your Honor.

The Court: I will allow that upon your request. Ladies and gentlemen of the jury, at this time, beginning first with the foreman of the jury, and then each other member of the jury, you will be polled concerning the verdict. And Madam Clerk, you will, upon request which has been allowed, do it in the same manner individually that you did collectively.

The Clerk polled each juror as to each answer on the verdict sheet, including those answers concerning mitigating circumstances. Each juror was polled individually as to each mitigating circumstances as follows:

The Clerk: "Issue Two: Do you unanimously find from the evidence the existence of one or more of the following mitigating circumstances? Answer, Yes." Is this your Answer?

Mr. Kimbrough [jury foreman]: Yes, ma'am.

The Clerk: Do you still assent thereto?

Mr. Kimbrough: Yes, ma'am.

The Clerk: As to the mitigating factors, "Number 1: This murder was committed while the defendant was under the influence of mental illness or emotional disturbance. Answer: No." Is this your answer?

Mr. Kimbrough: Yes, ma'am.

The Clerk: Do you still assent thereto?

Mr. Kimbrough: Yes, ma'am.

The clerk proceeded to ask Mr. Kimbrough, the jury foreman, the same questions about each mitigating circumstance. Then the clerk asked Mr. Kimbrough about the remaining sentencing issues:

The Clerk: "Issue Three: Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you? Answer: Yes." Is this your answer?

Mr. Kimbrough: Yes, ma'am.

The Clerk: Do you still assent thereto?

Mr. Kimbrough: Yes, ma'am.

The Clerk: "Issue Four: Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you? Answer: Yes." Is that your answer?

Mr. Kimbrough: Yes, ma'am.

The Clerk: Do you still assent thereto?

Mr. Kimbrough: Yes, ma'am.

The Clerk: Recommendation: "We the jury unanimously recommend that the defendant, Ricky Lee Price, be sentenced to death." Is that your recommendation?

Mr. Kimbrough: Yes, ma'am.

The Clerk: Do you still assent thereto?

Mr. Kimbrough: Yes, ma'am.

After questioning Mr. Kimbrough, the clerk asked each of the remaining eleven jurors the same questions. When the poll was completed, each juror had answered questions regarding each issue on the verdict sheet. Each individual answer was the same as the jury's answer on the verdict sheet. In other words, no individual juror had reached a decision different from that of the jury as a whole.

[1] In *State v. Laws*, 328 N.C. 550, 402 S.E.2d 573 (1991), we found *McKoy* error harmless where the trial court clerk's poll of the jury foreman and individual jury members demonstrated that the jury was unanimous in rejecting a mitigating circumstance not found to exist. We concluded that where "the record clearly establishes that no juror individually found defendant's evidence sufficiently substantial to support a finding of the ... mitigating circumstance, we can conclude with confidence that the unconstitutional unanimity requirement did not preclude any juror from considering mitigating evidence." *Id.* at 555, 402 S.E.2d at 577. The facts now before us are very similar to those in *Laws*, and for the reasons explained below we likewise conclude that the *McKoy* error here was harmless.

[2] The polling in this case established that for each of the nine mitigating circumstances not found by the jury, each individual juror had answered "No," thus rejecting that circumstance. Defendant contends that the clerk's question, "Is this your answer?" following the recitation of each mitigating circumstance was ambiguous, because a juror might have understood the word "your" to refer to the jury as a whole. In the context of polling jurors individually, defendant's interpretation is not reasonable. A reasonable juror would understand that if she were being questioned individually, the question was referring to her as an individual juror. The very purpose of the poll is to ascertain each juror's individual vote on the issue or issues in question. We are confident the jurors here did not understand it to be otherwise.

The *McKoy* error in *Laws* was cured by two polling procedures: A poll of the jury foreman about the jury's rejection as a whole of a mitigating circumstance and an individual poll of each juror about his or her rejection of the mitigating circumstance. In the instant case the trial court clerk polled jurors individually but did not poll the jury foreman about the jury's group responses. This is not a dispositive difference. Considered together, the results of the polls of each juror establish with sufficient certainty that each mitigating circumstance rejected by the jury was rejected unanimously and that no individual juror would have found any of these mitigating circumstances to exist had each individual juror been permitted to do so.

We recognized in *State v. Lloyd*, 329 N.C. 662, 407 S.E.2d 218 (1991), that *McKoy* error is not cured by every jury poll. The trial court clerk in *Lloyd* polled no jurors individually as to mitigating circumstances, but merely polled the jury foreman and the jury as a whole. The polling questions did not ask whether the jury's rejection of mitigating circumstances was unanimous. The record in that case was insufficient to demonstrate that the jury's rejection of each mitigating circumstance was unanimous. *Lloyd*, therefore, does not control here.

[3, 4] Although there is evidence which supports several of the mitigating circumstances not found by the jury, the *McKoy* error here is harmless beyond a reasonable doubt because the jury poll demonstrates unequivocally that "the instruction did not prevent any juror's consideration of defendant's mitigating evidence." *Laws*, 328 N.C. at 556, 402 S.E.2d at 577. Rather, the jury was unanimous in rejecting all the mitigating circumstances that it failed to find. A jury verdict unanimously rejecting mitigating circumstances cannot be dis-

turbed simply because the evidence would have permitted a reasonable juror to find otherwise. Unless the evidence entitles defendant to a peremptory instruction, *State v. Kirkley*, 308 N.C. 196, 302 S.E.2d 144 (1983), it is the jury's province to accept or reject such evidence.

Defendant's challenge to the death sentence on this basis must, therefore, fail.

II.

[5] Following the remand of this case by the United States Supreme Court, defendant filed a motion for appropriate relief asserting two assignments of error in regard to his sentencing hearing not included in his initial appeal. He assigns error to the trial court's failure to submit both prongs of the impaired capacity mitigating circumstance, N.C.G.S. § 15A-2000(f)(6), for the jury's consideration and to the trial court's refusal to submit as a nonstatutory mitigating circumstance defendant's ongoing sentence of life imprisonment for another murder. Defendant contends these new arguments are reviewable under N.C.G.S. § 15A-1415(b)(3), which provides for appropriate relief when defendant's conviction "was obtained in violation of the Constitution of the United States or the Constitution of North Carolina;" § 15A-1415(b)(7), which provides for appropriate relief when "[t]here has been a significant change in law, either substantive or procedural, applied in the proceedings leading to the defendant's conviction or sentence, and retroactive application of the changed legal standard is required;" and under § 15A-1415(b)(8), which provides for appropriate relief when the sentence imposed "was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law." Defendant further contends the motion is properly before this Court as provided in N.C.G.S. § 15A-1418(b):

> When a motion for appropriate relief is made in the appellate division, the appellate court must decide whether the motion may be determined on the basis of the materials before it, or whether it is necessary to remand the case to the trial division for taking evidence or conducting other proceedings. If the appellate court does not remand the case for proceedings on the motion, it may determine the motion in conjunction with the appeal and enter its ruling on the motion with its determination of the case.

Defendant argues that none of the grounds provided in N.C.G.S. § 15A-1419(a) for denying a motion for appropriate relief applies to this case, because defendant is still pursuing his initial appeal and has not exhausted a "previous" appeal in which he might have raised the issues presented here. The remand of this case by the United States Supreme Court has prolonged the pendency of defendant's direct appeal from his death sentence. Defendant notes that § 15A-1419(b) provides that in the interest of justice and for good cause shown the appellate court may in its discretion grant a motion for appropriate relief.

[6] Defendant's arguments based on N.C.G.S. §§ 15A-1415, 15A-1418, and 15A-1419 are unpersuasive. Motions for appropriate relief generally allow defendants to raise arguments that could not have been raised in an original appeal, such as claims based on newly discovered evidence and claims based on rights arising by reason of later constitutional decisions announcing new principles or changes in the law. *See* N.C.G.S. § 15A-1418 official commentary (1988). We agree with the State that statutes governing motions for appropriate relief were not intended to circumvent the orderly briefing of arguments on appeal. Motions for appropriate relief may not be used to add to an appeal new arguments which could have been raised in the briefs originally filed. Both of the arguments now raised by defendant in the motion for appropriate relief could have been raised in his original appeal. Therefore, defendant's motion for appropriate relief is subject to being dismissed.

We have nevertheless elected to review defendant's contentions raised in his motion for appropriate relief in the interests of both judicial economy and thorough

scrutiny of this capital case. "[I]t is the uniform practice of this Court in every case in which a death sentence has been pronounced to examine and review the record with minute care to the end it may affirmatively appear that all proper safeguards have been vouchsafed the unfortunate accused before his life is taken by the State." *State v. Fowler*, 270 N.C. 468, 469, 155 S.E.2d 83, 84 (1967); *accord, State v. Chance*, 279 N.C. 643, 657, 185 S.E.2d 227, 236 (1971) ("in capital cases we review the record and *ex mero motu* take notice of prejudicial error"); *see also* N.C.R.App.P. 2. We conclude that neither error assigned in his motion for appropriate relief entitles defendant to a new sentencing hearing.

[7] Defendant first contends the trial court committed reversible error by failing to instruct jurors on one of two prongs of a statutory mitigating circumstance regarding defendant's impaired mental capacity. N.C.G.S. § 15A-2000(f)(6) requires that the trial court submit to the jury the following mitigating circumstance if supported by the evidence: "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired." This statutory mitigating circumstance embraces two types of disability, one diminishing a person's ability to appreciate the criminal nature of his conduct, and the other diminishing a person's ability to control himself. *State v. Johnson*, 298 N.C. 47, 68, 257 S.E.2d 597, 613 (1979). During a charge conference at defendant's sentencing proceeding, defense counsel requested the trial court to instruct jurors only on the second prong of section 15A-2000(f)(6), concerning defendant's diminished capacity to conform his conduct to the law. According to the trial transcript, defense counsel explained the request:

> [W]e would submit to the Court that there is very little evidence that the capacity of the defendant to appreciate the criminality of his conduct was impaired. We would submit with respect to that that it is confusing to the jury to consider whether or not there might be some impairment of his ability to appreciate the criminality of his conduct, whereas, we would contend there was ample evidence there was an impairment of his ability to conform his conduct to requirements of law.

Obliging that request, the trial court did not submit to jurors the mitigating circumstance of defendant's diminished capacity to appreciate the criminality of his conduct. Also at defendant's request, the trial court submitted seven separate mitigating circumstances concerning various mental conditions impairing defendant's ability to control his conduct.[1]

The law concerning the submission of mitigating circumstances has developed significantly since defendant's initial appeal was heard and no error was found by this Court. In *State v. Bacon*, 326 N.C. 404, 417-20, 390 S.E.2d 327, 334-36 (1990), we held that when a statutory mitigating circumstance encompasses two distinct aspects, both must be submitted to the jury if they are supported by the evidence. In *State v. Lloyd*, 321 N.C. 301, 311-13, 364 S.E.2d 316, 323-24 (1988), *vacated and remanded on other grounds*, 494 U.S. 1021, 110 S.Ct. 1463, 108 L.Ed.2d 601 (1990), *on remand*, 329 N.C. 662, 407 S.E.2d 218 (1991), we held that a statutory mitigating circumstance supported by the evidence must be submitted even when a defendant requests that it not be submitted. The State contends this case differs from *Lloyd*, in which the trial court submitted a mitigating circumstance over defendant's objection, because here defense counsel made an affirmative, tactical request that the circumstance not be submitted and stated their reasons on the record. This procedural difference does not avoid the rule that "[w]hen evidence is presented in a capital case which may support a statutory mitigating circumstance, the trial court is mandated by the language in 15A-2000(b) to submit that circumstance to the jury for

1. These circumstances, reprinted in full *supra*, concerned evidence of defendant's low intelligence, manic-depressive illness, schizophrenic illness, emotional instability, drug abuse, drug-induced mental illness, and mixed personality disorder.

its consideration." *Lloyd*, 321 N.C. at 311–12, 364 S.E.2d at 323.

[8, 9] The State next contends the trial court committed no error in failing to give the instruction defendant now seeks because the evidence in this case did not support a finding that defendant lacked the capacity to appreciate the criminality of his conduct. We disagree. During defendant's sentencing proceeding, Dr. Brad Fisher, a psychologist allowed to testify as an expert by the trial court, testified that in his opinion defendant's manic-depression, exacerbated by drugs defendant said he was taking around the time of the murder, "would indeed have put severe limitations on his ability to make judgments, have appropriate mood responses, conform to the law and basically be properly in touch with reality." The test for sufficiency of evidence to support submission of a statutory mitigating circumstance is whether a jury could reasonably find that the circumstance exists based on the evidence. *Lloyd*, 321 N.C. at 312, 364 S.E.2d at 323. Dr. Fisher's testimony that defendant suffered from a mental illness that impaired his ability to make judgments, have appropriate mood responses, and be in touch with reality, considered with other evidence of defendant's past psychiatric problems resulting in hospitalization, would, in our view, allow a reasonable inference that defendant's capacity to appreciate the criminality of his conduct was impaired. *Cf. State v. Payne*, 328 N.C. 377, 408, 402 S.E.2d 582, 600 (1991) (evidence of defendant's substance abuse, including drinking alcohol the night before the murder and smelling like beer shortly after the murder, held sufficient to support submission of mitigating circumstance that intoxication impaired defendant's ability to appreciate the criminality of his conduct). Although evidence that defendant fled from the murder scene and hid supports a contrary conclusion, it does not negate the sufficiency of the evidence supporting the mitigating circumstance. *Cf. State v. Wilson*, 322 N.C. 117, 142–43, 367 S.E.2d 589, 603–04 (1988) (defendant's prior conviction for second-degree kidnapping and evidence that defendant had stored illegal drugs and participated in farm theft did not negate sufficiency of evidence to support submission of mitigating circumstance that defendant had no significant history of prior criminal activity). Because the evidence was sufficient to support submission of the mitigating circumstance to the jury, the trial court committed error in not submitting it, irrespective of defense counsel's request.

Having concluded the trial court erred in not submitting this mitigating circumstance, we now must decide whether the error prejudiced defendant so as to require a new sentencing hearing. Because this error implicates defendant's constitutional rights, *Wilson*, 322 N.C. at 145, 367 S.E.2d at 605, it is presumed prejudicial unless the State demonstrates that it was harmless beyond a reasonable doubt. N.C.G.S. § 15A–1443(b) (1988).

[10] The State has borne this burden. The mitigating circumstance of defendant's impaired capacity to appreciate the criminality of his act, had it been submitted, would have rested on the same evidence as all of the other mitigating circumstances dealing with defendant's mental disease and substance abuse. This evidence was that defendant suffered from various mental illnesses exacerbated by substance abuse. The most general of these mitigating circumstances was that the murder was committed while defendant was under the influence of a mental or emotional disturbance, N.C.G.S. § 15A–2000(f)(2). The jury unanimously rejected this most general and all the other more specific mitigating circumstances resting on the same evidence dealing with defendant's mental illnesses and substance abuse. It is clear, therefore, that the jury simply did not find this evidence credible. Having rejected it as to all the other mitigating circumstances resting upon it, particularly the most general of those circumstances dealing with defendant's alleged mental or emotional disturbance, it is inconceivable the jury would have accepted the evidence and found, on the basis of it, that prong of the impaired capacity mitigating circumstance not submitted. That the evidence, as defendant's trial counsel conceded, more strongly supported the mit
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ported the mitigating circumstances submitted than it did the one not submitted reinforces this conclusion. The record here thus demonstrates beyond a reasonable doubt that had the trial court submitted to the jury the mitigating circumstance of defendant's impaired capacity to appreciate the criminality of his conduct, none of the jurors would have found that circumstance to exist. Therefore, the error in failing to submit this circumstance does not require a new sentencing hearing.

Defendant also assigns error to the trial court's refusal to submit to the jury as a nonstatutory mitigating circumstance that defendant had received a life sentence in Virginia for another killing about which the prosecution had introduced evidence. Defendant contends the imposition of a substantial penalty in the other crime could have served as a basis for a sentence less than death in this case. According to the trial record, during the charge conference for the sentencing proceeding, defense counsel asked the trial court to submit the following mitigating circumstance: "The fact that defendant has received a life sentence and the fact that this judge may impose [an] additional life sentence to commence at the expiration of the previous life sentence provides additional protection to society." The prosecution objected to the proposed circumstance, and the trial court sustained the objection.

Defendant relies on *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), in which the United States Supreme Court held that a defendant's peaceful adjustment to prison life was an aspect of his character and relevant as a mitigating circumstance in a capital sentencing proceeding. The *Skipper* Court explained that "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination." *Id.* at 7, 106 S.Ct. at 1672, 90 L.Ed.2d at 8. The Court based that holding on the rule established in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and reiterated in *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), requiring that in capital cases "'"the sentencer ... not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."'" *Skipper*, 476 U.S. at 4, 106 S.Ct. at 1670–71, 90 L.Ed.2d at 6 (quoting *Eddings*, 455 U.S. at 110, 102 S.Ct. at 874, 71 L.Ed.2d at 8 (quoting *Lockett*, 438 U.S. at 604, 98 S.Ct. at 2964–65, 57 L.Ed.2d at 990 (plurality opinion of Burger, C.J.))) (emphasis in original).

[11] That defendant is currently serving a life sentence for another unrelated crime is not a circumstance which tends to justify a sentence less than death for the capital crime for which defendant is being sentenced. Although the sentence comprises part of his formal criminal record and was offered against defendant by the State in the sentencing hearing, "the additional protection to society" possibly achieved by his incarceration under that sentence is not an aspect of defendant's record. Because this evidence was irrelevant, we uphold the trial court's refusal to submit it as a mitigating circumstance. *See Lockett*, 438 U.S. at 604 n. 12, 98 S.Ct. at 2964–65 n. 12, 57 L.Ed.2d at 990 n. 12 ("Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense."); *see also State v. Robbins*, 319 N.C. 465, 519–23, 356 S.E.2d 279, 311–13 (1987) (evidence about possibility of parole is irrelevant to sentencing and the federal Constitution does not require consideration of such evidence).

In his initial appeal, defendant contended the trial court erred in barring defense counsel from arguing to the jury that if it returned a verdict of life imprisonment, the trial court could require the sentence to commence at the termination of the life sentence he was presently serving in Virginia. We held this was not error, noting that "[a]rgument concerning the effect of consecutive life sentences upon the period of a defendant's incarceration is, in another guise, argument about the legal effect of

parole upon defendant's sentence" and equally irrelevant to capital sentencing. *Price I*, 326 N.C. at 84, 388 S.E.2d at 100. Our holding today with regard to the very similar issue of defendant's proffered mitigating circumstance is the same.

In conclusion, we hold that because the record establishes that the jury unanimously rejected all mitigating circumstances not found on the verdict sheet, the *McKoy* error in this case was harmless. We further conclude that neither of the assignments of error raised in defendant's motion for appropriate relief merits relief. Accordingly, the sentence of death is affirmed and the mandate of our prior opinion is reinstated. The case is remanded to the Superior Court, Person County, for further proceedings.

DEATH SENTENCE AFFIRMED; MANDATE REINSTATED; CASE REMANDED.

LAKE, J., did not participate in the consideration or decision of this case.

STATE of North Carolina

v.

Mickey Alton PHIPPS.

No. 565A90.

Supreme Court of North Carolina.

June 25, 1992.

Defendant was convicted in the Superior Court, Wilkes County, Thomas W. Ross, J., of first-degree murder, and he appealed. The Supreme Court, Whichard, J., held that: (1) defendant was not "in custody" when he made incriminating statements to police; (2) indigent defendant was not entitled to ex parte hearing on his motion for expert assistance on fingerprint identification; (3) introduction of 52 color photographs of crime scene and victim's body for illustrative purposes was not abuse of discretion; (4) defendant was not entitled to jury instruction on defense of voluntary intoxication; but (5) jury instruction on second-degree murder was required.

No error in part; judgment arrested in part.

Meyer, J., filed dissenting opinion in which Mitchell and Lake, JJ., joined.

1. Criminal Law ⇐641.2(4, 6)

Defendant's Sixth Amendment right to counsel attached at his first appearance before judge of district court, rather than at time of his arrest or at time he confessed to murder. U.S.C.A. Const.Amend. 6.

2. Criminal Law ⇐412.2(2)

Defendant was not "in custody" when he made incriminating statements to police during murder investigation, so as to require *Miranda* warnings; defendant had cooperated with murder investigation from the outset, had come to police station on his own several times, and was permitted to return home each time. U.S.C.A. Const. Amend. 5.

See publication Words and Phrases for other judicial constructions and definitions.

3. Criminal Law ⇐619(9)

Defendant's confession to murder was knowing, intelligent and voluntary, although confession was made after multiple interrogations by police, including law enforcement visits to his home, and after defendant was confronted with his earlier inconsistent statements. U.S.C.A. Const. Amend. 5.

4. Costs ⇐302.3

Indigent defendant was not entitled to appointment of private investigator in murder prosecution on grounds his private attorney did not have sufficient time or expertise to interview all potential witnesses, where defendant's motion referred to no particular evidence or issue that would have been significant to case.

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IN THE SUPREME COURT OF NORTH CAROLINA

No. 585A87- Person County

State of North Carolina

v

Ricky Lee Price

JUDGMENT

This cause came on to be argued upon remand from the United States Supreme Court for further consideration in light of McKoy v. North Carolina, 494 U.S. 433, 108 LEd 2d 369 (1990). Upon reconsideration whereof, this Court is of the opinion that there is harmless error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable James G. Exum, Jr., Chief Justice, be certified to the said Superior Court to the intent that the death sentence is affirmed, the mandate is reinstated, and the case is remanded.

And it is considered and adjudged further, that the Defendant do pay the costs of the appeal in this Court incurred, to wit, the sum of Two Hundred Seven and no/100 dollars ($207.00), and execution issue therefor.

Certified to the Superior Court, Person County, this 15th day of July, 1992.

A TRUE COPY

CHRISTIE SPEIR PRICE
Clerk of the Supreme Court

By: Peggy M. Byrd
Assistant Clerk

A TRUE COPY
CLERK OF THE SUPREME COURT
OF NORTH CAROLINA
By: Dafe W. Stakemon
DEPUTY CLERK
13 October 1992

§ 15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

(a) Separate Proceedings on Issue of Penalty. —

(1) Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. A capital felony is one which may be punishable by death.

(2) The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. If prior to the time that the trial jury begins its deliberations on the issue of penalty, any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel. An alternate juror shall become a part of the jury in the order in which he was selected. If the trial jury is unable to reconvene for a hearing on the issue of penalty after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue of the punishment. If the defendant pleads guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. A jury selected for the purpose of determining punishment in a capital case shall be selected in the same manner as juries are selected for the trial of capital cases.

(3) In the proceeding there shall not be any requirement to resubmit evidence presented during the guilt determination phase of the case, unless a new jury is impaneled, but all such evidence is competent for the jury's consideration in passing on punishment. Evidence may be presented as to any matter that the court deems relevant to sentence, and may include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (e) and (f). Any evidence which the court deems to have probative value may be received.

(4) The State and the defendant or his counsel shall be permitted to present argument for or against sentence of death. The defendant or defendant's counsel shall have the right to the last argument.

(b) Sentence Recommendation by the Jury. — Instructions determined by the trial judge to be warranted by the evidence shall be given by the court in its charge to the jury prior to its deliberation in determining sentence. In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.

After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:

(1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and

(3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. Upon delivery of the sentence recommendation by the foreman of the jury, the jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned.

If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment, provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation.

(c) Findings in Support of Sentence of Death. — When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:

(1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and

(2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,

(3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

(d) Review of Judgment and Sentence. —

(1) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of North Carolina pursuant to procedures established by the Rules of Appellate Procedure. In its review, the Supreme Court shall consider the punishment imposed as well as any errors assigned on appeal.

(2) The sentence of death shall be overturned and a sentence of life imprisonment imposed in lieu thereof by the Supreme Court upon a finding that the record does not support the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death, or upon a finding that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, or upon a finding that the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The Supreme Court may suspend consideration of death penalty cases until such time as the court determines it is prepared to make the comparisons required under the provisions of this section.

(3) If the sentence of death and the judgment of the trial court are reversed on appeal for error in the post-verdict sentencing proceeding, the Supreme Court shall order that a new sentencing hearing be conducted in conformity with the procedures of this Article.

(e) Aggravating Circumstances. — Aggravating circumstances which may be considered shall be limited to the following:

(1) The capital felony was committed by a person lawfully incarcerated.

(2) The defendant had been previously convicted of another capital felony.

(3) The defendant had been previously convicted of a felony involving the use or threat of violence to the person.

(4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(5) The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any homicide, robbery, rape or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(6) The capital felony was committed for pecuniary gain.

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(8) The capital felony was committed against a law-enforcement officer, employee of the Department of Correction, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the performance of his official duties or because of the exercise of his official duty.

(9) The capital felony was especially heinous, atrocious, or cruel.

(10) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(11) The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons.

(f) Mitigating Circumstances. — Mitigating circumstances which may be considered shall include, but not be limited to, the following:

(1) The defendant has no significant history of prior criminal activity.

(2) The capital felony was committed while the defendant was under the influence of mental or emotional disturbance.

(3) The victim was a voluntary participant in the defendant's homicidal conduct or consented to the homicidal act.

(4) The defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor.

(5) The defendant acted under duress or under the domination of another person.

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

(7) The age of the defendant at the time of the crime.

(8) The defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.

(9) Any other circumstance arising from the evidence which the jury deems to have mitigating value. (1977, c. 406, s. 2; 1979, c. 565, s. 1; c. 682, s. 9; 1981, c. 652, s. 1.)

STATE OF NORTH CAROLINA

COUNTY OF PERSON

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

No. 85 CrS 1772

STATE OF NORTH CAROLINA)
)
-vs-)
)
RICKY LEE PRICE)

ISSUES AND RECOMMENDATION

AS TO PUNISHMENT

ISSUES

Issue One:

Do you unanimously find from the evidence, beyond a reasonable doubt, the existence of one or more of the following aggravating circumstances?

ANSWER: yes.

BEFORE YOU ANSWER ISSUE ONE, CONSIDER EACH OF THE FOLLOWING AGGRAVATING CIRCUMSTANCES. IN THE SPACE AFTER EACH AGGRAVATING CIRCUMSTANCE, WRITE "YES," IF YOU UNANIMOUSLY FIND THAT AGGRAVATING CIRCUMSTANCE FROM THE EVIDENCE BEYOND A REASONABLE DOUBT. WRITE, "NO," IF YOU DO NOT FIND THAT AGGRAVATING CIRCUMSTANCE FROM THE EVIDENCE BEYOND A REASONABLE DOUBT.

IF YOU WRITE, "YES," IN ONE OR MORE OF THE SPACES AFTER THE FOLLOWING AGGRAVATING CIRCUMSTANCES, WRITE, "YES," IN THE SPACE AFTER ISSUE ONE AS WELL. IF YOU WRITE, "NO," IN ALL OF THE SPACES AFTER THE FOLLOWING AGGRAVATING CIRCUMSTANCES, WRITE, "NO," IN THE SPACE AFTER ISSUE ONE.

(1) Had the defendant been previously convicted of a felony involving the use of violence to the person; to wit: the conviction of murder arising out of the death of Joan Brady which occurred October 18, 1984?

ANSWER: yes.

(2) Was this murder part of a course of conduct in which the defendant engaged and did that course of conduct include the commission by the defendant of other crimes of violence against Elaine Clay, Robbie Davis, James Hardy, and Tony Cammon?

ANSWER: yes.

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IF YOU ANSWERED ISSUE ONE "NO," SKIP ISSUES TWO, THREE, AND FOUR, AND INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT", ON THE LAST PAGE OF THIS FORM. IF YOU ANSWERED ISSUE ONE, "YES," PROCEED TO ISSUE TWO.

Issue Two:

Do you unanimously find from the evidence the existence of one or more of the following mitigating circumstances?

ANSWER: yes.

BEFORE YOU ANSWER ISSUE TWO, CONSIDER EACH OF THE FOLLOWING MITIGATING CIRCUMSTANCES. IN THE SPACE AFTER EACH MITIGATING CIRCUMSTANCE, WRITE "YES," IF YOU UNANIMOUSLY FIND THAT MITIGATING CIRCUMSTANCE BY A PREPONDERANCE OF THE EVIDENCE. WRITE, "NO," IF YOU DO NOT UNANIMOUSLY FIND THAT MITIGATING CIRCUMSTANCE BY A PREPONDERANCE OF THE EVIDEMCE.

IF YOU WRITE, "YES," IN ONE OR MORE OF THE SPACES AFTER THE FOLLOWING MITIGATING CIRCUMSTANCES, WRITE, "YES," IN THE SPACE AFTER ISSUE TWO AS WELL. IF YOU WRITE, "NO," IN ALL OF THE SPACES AFTER THE FOLLOWING MITIGATING CIRCUMSTANCES, WRITE, "NO," IN THE SPACE AFTER ISSUE TWO.

(1) This murder was committed while the defendant was under the influence of mental illness or emotional disturbance.

ANSWER: NO.

(2) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by low intelligence.

ANSWER: NO.

(3) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by manic depressive illness.

ANSWER: NO.

(4) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by schizophrenic illness.

ANSWER: NO.

(5) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by emotional instability.

ANSWER: NO.

PAGE 3

(6) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by drug abuse.

ANSWER: No.

(7) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by drug-induced mental illness.

ANSWER: No.

(8) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by mixed personality disorder.

ANSWER: No.

(9) The defendant's family has a history of mental illness or emotional disturbance.

ANSWER: yes.

(10) Any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value.

ANSWER: No.

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ANSWER ISSUE THREE IF YOU ANSWERED ISSUE TWO, "YES," IF YOU ANSWERED ISSUE TWO, "NO," SKIP ISSUE THREE AND ANSWER ISSUE FOUR.

Issue Three:

Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you, is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you?

ANSWER: yes.

IF YOU ANSWER ISSUE THREE, "NO," INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT." IF YOU ANSWER ISSUE THREE, "YES," PROCEED TO ISSUE FOUR.

Issue Four:

Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you?

ANSWER: yes.

IF YOU ANSWER ISSUE FOUR, "NO," INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT" ON THE LAST PAGE OF THIS FORM. IF YOU ANSWER ISSUE FOUR "YES," INDICATE DEATH UNDER "RECOMMENDATION AS TO PUNISHMENT."

RECOMMENDATION AS TO PUNISHMENT

INDICATE YOUR RECOMMENDATION AS TO PUNISHMENT BY WRITING "LIFE IMPRISONMENT" OR "DEATH," IN THE BLANK IN THE FOLLOWING SENTENCE:

We, the jury, unanimously recommend that the defendant, Ricky Lee Price be sentenced to Death.

This the 24th day of September, 1987.

David W. Kirkpatrick (Signature)
Jury Foreman

THE COURT: Ladies and gentlemen of the jury, all of the evidence has been presented. The attorneys have made their arguments to you. At this time I will instruct you as to the law.

Members of the jury, having found the defendant guilty of murder in the first degree, it is now your duty to recommend to the Court whether the defendant should be sentenced to death or to life imprisonment. Your recommendation will be binding upon the Court.

If you unanimously recommend that the defendant be sentenced to death, the Court will be required to impose a sentence of death. If you unanimously recommend a sentence of life imprisonment, the Court will be required to impose a sentence of imprisonment in the State's prison for life.

All of the evidence relevant to your recommendation has been presented. There is no requirement to resubmit during the sentencing proceeding any evidence which was submitted during the guilt phase of this case. All of the evidence which you hear in both phases of the case is competent for your consideration in recommending punishment.

It is now your duty to decide from all the evidence presented in both phases what the

facts are. You must then apply the law which I am about to give you concerning punishment to those facts. It is absolutely necessary that you understand and apply the law as I give it to you and not as you think it is or might like it to be. This is important because justice requires that everyone who is sentenced for first degree murder have the sentence recommendation determined in the same manner and have the same law applied to him.

You are the sole judges of the credibility, that is, the believability of each witness. You must decide for yourselves whether to believe the testimony of any witness. You may believe all or any part or none of what a witness has said on the stand.

In determining whether to believe any witness, you should apply the same tests of truthfulness which you apply in your everyday affairs. As applied to this trial, these tests may include the opportunity of the witness to see, hear, know or remember the facts or occurrences about which he or she testified; the manner and appearance of the witness; any interest, bias or prejudice the witness may have; the apparent understanding and fairness of the witness; whether his or her testimony is reasonable and whether his

or her testimony is consistent with other believable evidence in the case.

You are the sole judges of the weight to be given any evidence. By this I mean if you decide that certain evidence is believable, you must then determine the importance of that evidence in light of all other believable evidence in the case.

[Evidence has been received tending to show that at an earlier time the defendant, Ricky Lee Price, made a statement to Janice Bates that he had previously used drugs such as microdot, acid and marijuana. This statement may be consistent with or may conflict with Ricky Lee Price's testimony at this trial. You must not consider such earlier statement as evidence as the truth of what was said at that earlier time because it was not made under oath at this trial. If you believe that such earlier statement was made and that it is consistent or does conflict with the testimony of the defendant at this trial, then you may consider this together with all other facts and circumstances bearing upon the defendant's truthfulness in deciding whether you will believe or disbelieve his testimony at this trial. And by using the term at this trial I am referring to this sentencing phase.] Exception No. 146

There is evidence which tends to show that Jerald Inman has been convicted of a marijuana offense in North Carolina and in Virginia has been convicted of three or four conspiracies, conspiracy to commit burglary, conspiracy to commit grand larceny and two counts of grand larceny and a probation violation.

There is evidence which tends to show that James Moneymaker has been convicted of murder, unlawful wounding and driving while his license was revoked.

There is evidence which tends to show that Mike Dennis Hancock has been convicted of breaking and entering and hit and run.

In connection with these -- in connection with this evidence, you may consider this evidence for one purpose only. If considering the nature of the crimes you believe that this bears on truthfulness, then you may consider it together with all other facts and circumstances bearing upon the witness' truthfulness in deciding whether you will believe or disbelieve his testimony at this trial. Except as it may bear on this decision, this evidence may not be considered by you in your determination of any fact in this case.

Ladies and gentlemen of the jury, I

charge that for you to recommend that the defendant be sentenced to death, the State must prove three things beyond a reasonable doubt.

A reasonable doubt is a doubt based on reason and common sense arising out of some or all of the evidence that has been presented or lack or insufficiency of the evidence as the case may be.

Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of each of the following things.

First, that one or more aggravating circumstances existed. Second, that any mitigating circumstances you have found are insufficient to outweigh any aggravating circumstances you have found, and third, that any aggravating circumstances you have found are sufficiently substantial to call for the imposition of the death penalty when considered with any mitigating circumstances you have found.

If you unanimously find all three of these things beyond a reasonable doubt, it would be your duty to recommend that the defendant be sentenced to death. If you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to recommend that the defendant

be sentenced to life imprisonment.

When you retire to deliberate your recommendation as to punishment, you will take with you a form entitled "Issues and Recommendation as to Punishment." This form contains a written list of four issues relating to aggravating and mitigating circumstances.

I will now take up these four issues with you in greater detail, one by one. To enable you to follow me more closely, the bailiff will now give each of you a copy of the form entitled "Issues and Recommendation as to Punishment" which you will take with you when you retire to deliberate.

Mr. Bailiff --

THE BAILIFF: Yes, sir.

THE COURT: You will hand copies of this form entitled "Issues and Recommendation as to Punishment" to each juror.

Do not read ahead on this form, but refer to it as I instruct you on the law.

Issue One is on the first page near the top of the page. Issue One is "Do you unanimously find from the evidence, beyond a reasonable doubt, the existence of one or more of the following aggravating circumstances?"

Two possible aggravating circumstances are listed on the form and you should consider each of them before you answer Issue One. The State must prove from the evidence beyond a reasonable doubt the existence of any aggravating circumstance, and before you may find any aggravating circumstance, you must agree unanimously that it has been so proven.

An aggravaging circumstance is a fact or group of facts which tend to make a specific murder particularly deserving of the maximum punishment prescribed by law. Our law identifies the aggravating circumstances which may -- which might justify a sentence of death. Only those circumstances identified by statute may be considered by you as aggravating circumstances.

Under the evidence in this case, two possible aggravating circumstances may be considered. The following are the aggravating circumstances which might be applicable to this case: [(1) "Had the defendant been previously convicted of a felony involving the use of violence to the person, to-wit: the conviction of murder arising out of the death of Joan Brady which occurred October 18, 1984?"] Exception No. 147

[Murder is by definition a felony involving the use of violence to the person. A person has

been previously convicted if he has been convicted and not merely charged and if his conviction is based on conduct which occurred before the events out of which this murder arose.

If you find from the evidence beyond a reasonable doubt that on or about the 19th day of October, 1984, Joan Brady was murdered and that the defendant had been convicted of the murder of Joan Brady in the Circuit Court of Danville, Virginia, and that the defendant killed the victim Brenda Leigh Smith after he committed the murder of Joan Brady, you would find this aggravating circumstance and would so indicate by having your foreman write yes in the space after this aggravating circumstance on the Issues and Recommendation form. If you do not so find or have a reasonable doubt as to one or more of these things, you will not find this aggravating circumstance and will so indicate by having your foreman write no in that space.] Exception No. 148

[(2) "Was this murder part of a course of conduct in which the defendant engaged and did that course of conduct include the commission by the defendant of other crimes of violence against Elaine Clay, Robbie Davis, James Lardy and Tony Cameron?"] Exception No. 149

[A murder is part of such a course of

conduct if it and the other crimes of violence are part of a pattern of same or similar acts repeated over a period of time, however short, which establish that there existed in the mind of the defendant a plan, scheme, system or design involving both the murder and those other crimes of violence.] Exception No. 15:

I instruct you that you shall not consider the death of Joan Brady in connection with this possible aggravating factor.

[If you find from the evidence beyond a reasonable doubt that in addition to killing the victim Brenda Leigh Smith on October 21st, 1984, the defendant on or about the 22nd of October, 1984, was engaged in a course of conduct which involved the commission of another crime, the crime of arson, by intentionally setting fire to and burning a portion of the home of Elaine Clay the early morning of October 22nd, 1984, between 1:00 a.m. and 1:45 a.m. when Elaine Clay and her child, Robbie Davis, were in that home in bed, and that on the 22nd day of October, 1984, the defendant was engaged in a course of conduct which involved the commission of another crime, restraining James Hardy without his consent by intentionally tying and gagging James Hardy about 6:00 p.m., October 22nd, 1984, at James Hardy's residence

on Cambridge Road in Danville, Virginia, and that on the 22nd day of October, 1984, the defendant was engaged in a course of conduct which involved the commission of another crime, by kidnapping Tony Gammon by holding a knife to his throat, restraining him for the purpose of holding Tony Gammon as a hostage or by assaulting Tony Gammon by intentionally holding a knife to Tony Gammon's neck for five and a half hours from about 6:00 p.m. until 11:30 p.m. on October 22nd, 1984, in the basement and backyard of the residence of James Hardy in Danville, Virginia, and that these other crimes were included in the same course of conduct in which the killing of the victim, Brenda Leigh Smith, was also a part, you would find this aggravating circumstance and would so indicate by having your foreman write yes in the space after this aggravating circumstance on the issues and Recommendation form.] Exception No. 15?

If you do not so find or if you have a reasonable doubt as to one or more of these things, you will not find this aggravating circumstance and will so indicate by having your foreman write no in that space.

If you unanimously find from the evidence beyond a reasonable doubt that one or both of these

aggravating circumstances existed and have so indicated by writing yes in the space after one or both of them on the Issues and Recommendation form, you would answer Issue Number One yes. If you do not unanimously find from the evidence beyond a reasonable doubt that at least one of these aggravating circumstances existed, and if you have so indicated by writing no in the space after every one of them on that form, you would answer Issue Number One no.

If you answer Issue Number One no, you would skip Issues Two, Three and Four and you must recommend that the defendant be sentenced to life imprisonment.

If you answer Issue Number One yes, you would then consider Issue Number Two. Issue Number Two is at the top of Page 2 -- it is near the top of Page 2.

[Issue Two is "Do you unanimously find from the evidence the existence of one or more of the following mitigating circumstances?"] Exception No. 152

Ten possible mitigating circumstances are listed on the form, and you should consider each of them before answering Issue Number Two.

[A mitigating circumstance is a fact or group of facts which do not constitute a justification

or excuse for a killing or reduce it to a lesser degree of crime than first degree murder but which may be considered as extenuating or reducing the moral culpability of the killing or making it less deserving or extreme punishment than other first degree murders -- strike that.

A mitigating circumstance -- I am going to ask that you put those forms on your lap and I'll tell you when to refer to them again.

A mitigating circumstance is a fact or group of facts which do not constitute a justification or excuse for a killing or reduce it to a lesser degree of crime than first degree murder but which may be considered as extenuating or reducing the moral culpability of the killing or making it less deserving of extreme punishment than other first degree murders.] Exception No. 153

Our law identifies several possible mitigating circumstances. However, in considering Issue Two, it would be your duty to consider as a mitigating circumstance any aspect of the defendant's character and any of the circumstances of this murder that the defendant contends is a basis for a sentence less than death, and any other circumstances arising from the evidence which you deem to have mitigating

value.

[The defendant has the burden of persuading you that a given mitigating circumstance exists. The existence of any mitigating circumstance must be established by a preponderance of the evidence, that is, the evidence taken as a whole must satisfy you not beyond a reasonable doubt but simply satisify you that any mitigating circumstance exists.] Exception No. 154

If the evidence satisfies you that a mitigating circumstance exists, you would find that circumstance. If not, you would not find it. In either event, you would move on to consider the other mitigating circumstances and continue in like manner until you have considered all of the mitigating circumstances listed on the form, and any others which you deem to have mitigating value.

It is your duty to consider the following mitigating circumstances and any others which you find from the evidence.

(1) -- and you will see this at the middle of Page 2 on the form that you have.

(1) Consider whether "This murder was committed while the defendant was under the influence of mental illness or emotional disturbance. A defendant is under such influence if he is in any way affected

or influenced by a mental illness or emotional disturbance at the time he kills.

For this mitigating circumstance to exist, it is enough that the defendant's mind or emotions were disturbed from any cause and that he was under the influence of the disturbance when he killed the victim. You would find this mitigating circumstance if you find that the defendant thought that he had too many girlfriends and had to eliminate some of his girlfriends, or that the defendant had consumed acid or other drugs, or that the defendant was mentally ill, or that his mind or emotions were disturbed from any cause, and that as a result the defendant was under the influence of mental illness or emotional disturbance when he killed the victim and you would so indicate by having your foreman write yes in the space after this mitigating circumstance on the Issues and Recommendation form.

[If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, you will so indicate by having your foreman write no in that space.] Exception No. 155

(2) Consider whether "The capacity of the defendant to conform his conduct to the requirements of the law was impaired by low intelligence."

A person's capacity to conform his conduct to the law is not the same as his ability to know right from wrong generally or to know that he was -- or to know that what he is doing at a given time is killing or that such killing is wrong.

This mitigating circumstance would exist even if the defendant did appreciate the criminality of his conduct if his capacity to conform to the law was impaired since a person may appreicate that his killing is wrong and still lack the capacity to refrain from doing it.

Again, the defendant need not wholly lack all capacity to conform. It is enough that such capacity as he might otherwise have had in the absence of low intelligence is lessened or diminished because of such low intelligence.

You would find this mitigating circumstance if you find that the defendant was a person of low intelligence with an I.Q. of 71, and that this impaired his capacity to conform his conduct to the requirements of the law and would so indicate by having your foreman write yes in the space after this mitigating circumstance on the Issues and Recommendation form.

[If you do not unanimously find this mitigating circumstance by a preponderance of the

evidence, you will so indicate by having your foreman write no in that space.] Exception No. 156

(3) Consider whether "The capacity of the defendant to conform his conduct to the requirements of the law was impaired by manic-depressive illness."

A person's capacity to conform his conduct to the law is not the same as his ability to know right from wrong generally or to know that what he is doing at a given time is killing or that such killing is wrong.

This mitigating circumstance would exist even if the defendant did appreciate the criminality of his conduct if his capacity to conform to the law was impaired since a person may appreciate that his killing is wrong and still lack the capacity to refrain from doing it.

Again, the defendant need not wholly lack all capacity to conform. It is enough that such capacity as he might otherwise have had in the absence of such manic-depressive illness is lessened or diminished because of such manic-depressive illness.

You would find this mitigating circumstance if you find that the defendant suffered from manic-depressive illness and that this impaired his capacity to conform his conduct to the requirements of the

law and would so indicate by having your foreman write yes in the space after this mitigating circumstance on the Issues and Recommendation form.

[If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, you will so indicate by having your foreman write no in that space.] Exception No. 157

(4) Consider whether "The capacity of the defendant to conform his conduct to the requirements of the law was impaired by schizophrenic illness."

A person's capacity to conform his conduct to the law is not the same as his ability to know right from wrong generally or to know what he is doing at a given time is killing or that such killing is wrong.

This mitigating circumstance would exist even if the defendant did appreciate the criminality of his conduct if his capacity to conform to the law was impaired since a person may appreciate that his killing is wrong and still lack the capacity to refrain from doing it.

Again, the defendant need only -- strike that.

Again, the defendant need not wholly lack all capacity to conform. It is enough that

such capacity as he might otherwise have had in the absence of schizophrenic illness is lessened or diminished because of such schizophrenic illness.

You would find this mitigating circumstance if you find that the defendant suffered from schizophrenic illness and that this impaired his capacity to conform his conduct to the requirements of the law and would so indicate by having your foreman write yes in the space after this mitigating circumstance on the Issues and Recommendation form.

[If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, you would so indicate by having your foreman write no in that space.] Exception No. 158

(5) Consider whether "The capacity of the defendant to conform his conduct to the requirements of the law was impaired by emotional instability."

A person's capacity to conform his conduct to the law is not the same as his ability to know right from wrong generally, or to know what he is doing at a given time is killing or that such killing is wrong.

This mitigating circumstance would exist even if the defendant did appreciate the criminality of his conduct if his capacity to conform to the

law was impaired since a person may appreciate that his killing is wrong and still lack the capacity to refrain from doing it.

Again, the defendant need not wholly lack all capacity to conform. It is enough that such capacity as he might have otherwise have had in the absence of emotional instability is lessened or diminished because of such emotional instability.

You would find this mitigating circumstance if you find that the defendant suffered from emotional instability and that this impaired his capacity to conform his conduct to the requirements of the law and would so indicate by having your foreman write yes in the space after this mitigating circumstance on the Issues and Recommendation form.

[If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, you will so indicate by having your foreman write no in that space.] Except. ... 159.

At this time, turn to Page 3. At the top of Page 3 you will see Number 6.

(6) Consider whether "The capacity of the defendant to conform his conduct to the requirements of the law was impaired by drug abuse."

A person's capacity to conform his

conduct to the law is not the same as his ability to know right from wrong generally, or to know that what he is doing at a given time is killing or that such killing is wrong.

This mitigating circumstance would exist even if the defendant did appreciate the criminality of his conduct if his capacity to conform to the law was impaired since a person may appreicate that his killing is wrong and still lack the capacity to refrain from doing it.

Again, the defendant need not wholly lack all capacity to conform. It is enough that such capacity as he might otherwise have had in the absence of drug abuse is lessened or diminished because of such drug abuse.

You would find this mitigating circumstance if you find that the defendant consumed drugs before killing Brenda Leigh Smith and that this impaired his capacity to conform his conduct to -- to the requirements of the law and would so indicate by having your foreman write yes in the space after this mitigating circumstance on the Issues and Recommendation form.

[If you do not unanimously find this mitigating circumstance by a preponderance of the

evidence, you will so indicate by having your foreman write no in that space.] Exception 160

(7) Consider whether "The capacity of the defendant to conform his conduct to the requirements of the law was impaired by drug-induced mental illness."

A person's capacity to conform his conduct to the law is not the same as his ability to know right from wrong generally, or to know that what he is doing at a given time is killing or that such killing is wrong.

" This mitigating circumstance would exist even if the defendant did appreciate the criminality of his conduct if his capacity to conform to the law was impaired since a person may appreciate that his killing is wrong and still lack the capacity to refrain from doing it.

Again, the defendant need not wholly lack all capacity to conform. It is enough that such capacity as he might otherwise have had in the absence of drug-induced mental illness is lessened or diminished because of such drug-induced mental illness.

You would find this mitigating circumstance if you find that the defendant suffered from drug-

induced mental illness and that this impaired his capacity to conform his conduct to the requirements of the law and would so indicate by having your foreman write yes in the space after this mitigating circumstance on the Issues and Recommendation form.

[If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, you will so indicate by having your foreman write no in that space.] Exception 161

(8) Consider whether "The capacity of the defendant to conform his conduct to the requirements of the law was impaired by mixed personality disorder.

A person's capacity to conform his conduct to the law is not the same as his ability to know right from wrong generally, or to know that what he is doing at a given time is killing, or that such killing is wrong.

This mitigating circumstance would exist even if the defendant did appreciate the criminality of his conduct if his capacity to conform to the law was impaired since a person may appreciate that his killing is wrong and still lack the capacity to refrain from doing it.

Again, the defendant need not wholly lack all capacity to conform. It is enough that

such capacity as he might otherwise have had in the absence of mixed personality disorder is lessened or diminished because of such mixed personality disorder.

You would find this mitigating circumstance if you find that the defendant suffered from a mixed personality disorder and that this impaired his capacity to conform his conduct to the requirements of the law and would so indicate by having your foreman write yes in the space after this mitigating circumstance on the Issues and Recommendation form.

[If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, you will so indicate by having your foreman write no in that space.] Exception No. 162

(9) Consider whether "The defendant's family has a history of mental illness or emotional disturbance."

The defendant has offered evidence which tends to show that his uncle and aunt have been hospitalized for mental illness and his mother has suffered nervous breakdowns. The mitigating effect of the history of mental illness or emotional disturbance in the defendant's family is for you to determine from all of the facts and circumstances which you find from the evidence. If you so find,

you would so indicate by having your foreman write yes in the space after this mitigating circumstance on the Issues and Recommendation form.

[If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, you will so indicate by having your foreman write no in that space.] Exception No. 163

(10) Finally, you may consider "Any other circumstance or circumstances arising from the evidence which you, the jury, deem to have mitigating value."

[If you do unanimously so find by a preponderance of the evidence, you will so indicate by having your foreman write yes in the space after the mitigating circumstance Number 10 on the Issues and Recommendation form.

If you do not unanimously find the mitigating circumstance by a preponderance of the evidence, you will so indicate by having your foreman write no in that space.

If you unanimously find by a preponderance of the evidence one or more mitigating circumstances and have so indicated by writing yes in the space after one or more of them on the Issues and Recommendation form, you would then answer Issue Number Two yes.

If you do not unanimously find by a preponderance of the evidence that at least one of these mitigating circumstances existed and if you have so indicated by writing no in the space after every one of them on that form, you would answer Issue Two no.] Ex. No. 164

If you answer Issue Two yes, you must consider Issue Three. If you answer Issue Two no, do not answer Issue Three. Instead, skip Issue Three and answer Issue Four.

You will find Issue Three near the top of Page 4. Again, answer Issue Three if you answered Issue Two yes. If you answered Issue Two no, skip Issue Three and answer Issue Four.

Issue Three is "Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you?"

If you find from the evidence one or more mitigating circumstances, you must weigh the aggravating circumstances against the mitigating circumstances. In so doing, you are the sole judges of the weight to be given to any individual circumstance that you find, whether aggravating or mitigating.

You should not merely add up the number of aggravating circumstances and mitigating circumstances. Rather, you must decide from all the evidence what value to give each circumstance and then weigh the aggravating circumstances or circumstance so valued against the mitigating circumstance or circumstances so valued and finally determine whether the mitigating circumstances outweigh the aggravating circumstances.

If you unanimously find beyond a reasonable doubt that the mitigating circumstances found by you are insufficient to outweigh the aggravating circumstance or circumstances found by you, you would answer Issue Three yes.

If you do not so find or have a reasonable doubt as to whether they do, you would answer Issue Three no.

If you answer Issue Three no, it would be your duty to recommend that the defendant be sentenced to life imprisonment. If you answer Issue Three yes, you must then consider Issue Four.

Issue Four is in the middle of Page 4. Issue Four is "Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is or are sufficiently substantial to call for the imposition of the death

penalty when considered with the mitigating circumstance or circumstances found by you?"

In deciding this fourth issue, you are not to consider the aggravating circumstance or circumstances standing alone. You must consider it or them in connection with any mitigating circumstance or circumstances found by you.

After considering the totality of the aggravating and mitigating circumstances, you must be convinced beyond a reasonable doubt that the imposition of the death penalty is justified and appropriate in this case before you can answer the issue yes.

In so doing, you are not applying a mathematical formula. For example, three circumstances of one kind do not automatically and of necessity outweigh one circumstance of another kind. The number of circumstances found is only one consideration in determining which circumstance outweighs others or in determining which circumstances outweigh others.

You may very properly emphasize one circumstance more than another in a particular case. You must consider the relative substantiality and persuasiveness of the existing aggravating and mitigating circumstances in making this determination.

You, the jury, must determine how compelling

and persuasive the totality of the aggravating circumstances are when compared with the totality of the mitigating circumstances found by you.

[After so doing, if you are satisified beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the death penalty, it would be your duty to answer the issue yes. If you are not so satisfied or have a reasonable doubt, it would be your duty to answer the issue no.] Exc. No. 165

In the event you do not find the existence of any mitigating circumstances, you must still answer this issue. In such case you must determine whether the aggravating circumstances found by you are of such value, weight, importance, consequence or significance as to be sufficiently substantial to call for the imposition of the death penalty.

Substantial circumstances may be contrasted with circumstances that are flimsy, abstract, imaginary, deceptive or negligible. Substantial means having substance or weight, importance, significant or momentous. Aggravating circumstances may exist in a particular case and still not be sufficiently substantial to call for the death penalty. Therefore, it is not enough for the State to prove from the evidence beyond

a reasonable doubt the existence of one or more aggravating circumstances. It must also prove beyond a reasonable doubt that such aggravating circumstances are sufficiently substantial to call for the imposition of the death penalty, and before you may answer Issue Four yes, you must agree unanimously that they are.

[If you answer Issue Four no, you must recommend that the defendant be sentenced to life imprisonment. If you answer Issue Four yes, it would be your duty to recommend that the defendant be sentenced to death.] 166

Now, members of the jury, you have heard the evidence and the arguments of counsel for the State and for the defendant. The Court has not summarized all of the evidence.

It is your duty to remember all of the evidence whether it has been called to your attention or not, and if your recollection of the evidence differs from anything that the Court has said as to evidence or anything the district attorneys have said or the defense attorneys have said in their speeches to you, I instruct you that you are to rely soley upon your recollection of the evidence in your deliberation.

I have not reviewed the contentions

of the State or of the defendant, but it is your duty not only to consider all of the evidence, but also to consider all of the arguments, the contentions and positions urged by the State's attorneys and the defendant's attorneys in their speeches to you and any other contention that arises from the evidence, and to weigh them in light of your common sense and to make your recommendation as to punishment.

The law, as indeed it should, requires the presiding judge to be impartial. You are not to draw any inference from any ruling that I've made or any inflection in my voice or expression on my face or any question I may have asked a witness or anything else that I may have said or done during this trial that I have an opinion or have intimated an opinion as to whether any part of the evidence should be believed or disbelieved, as to whether any aggravating or mitigating circumstance has been proved or disproved or as to what your recommendation ought to be.

It is your exclusive province to find the true facts of the case and to make a recommendation reflecting the truth as you find it.

When you are ready to make a recommendation, have your foreman write your recommendation as directed

on the Issues and Recommendation form.

Now, at this time the Court excuses the three alternate jurors. Please step down. Hand the forms that you now have to the bailiff and have a seat in the courtroom. That would be Mr. Oakley, Mrs. Clayton and Mrs. Vaughan are excused. Please have a seat in the courtroom.

(Alternates complied.)

THE COURT: Now, ladies and gentlemen of the jury, as you retire to the jury room, you should first select one of your members to serve as your foreman to lead you in your deliberations. Do not begin your deliberations on the issues and recommendation until you receive written forms from the bailiff. You may carry into the jury room the forms you have in your possession, but do not begin your deliberations until you receive written forms from the bailiff.

Proceed immediately with the selection of your foreman, and then knock upon the jury room door and one of two things will occur. Either you will recieve the written form from the bailiff, and if that occurs, that will be your signal to begin deliberations. Or, you will be brought back into the courtroom for any further instructions by the

Court.

When you have received -- when you have reached a unanimous decision as to the issues and recommendation and are ready to pronounce them and your foreman has written your answers on the form, have your foreman sign and date the bottom of the fourth page on the paper writing forms delivered to the jury room by the bailiff, and notify the bailiff by knocking on the door to the jury room, and you will be returned to the jury room to pronounce your answers to the issues and recommendation.

At this time, Mr. Bailiff, take the jury to the jury room for the limited purpose of selecting a foreman.

THE BAILIFF: Yes, sir.

(Whereupon at 2:53 p.m. the following took place out of the presence of the jury:)

THE COURT: Now, in the absence of the twelve jurors, before sending the Issues and Recommendation forms to the jury and allowing them to begin their deliberations, I will now consider any requests for corrections to the charge to the jury or any additional matters that anyone feels are necessary or appropriate to submit a proper and accurate charge to the jury.

reach the death penalty phase of this case, that would be only after the State has convinced the jury that the defendant is guilty of first degree murder, premeditated murder; you understand that?

MR. KIMBROUGH: Yes, sir.

MR. GALLOWAY: Do you have any preference at that point, nothing else appearing, do you feel that a person who is guilty of first degree murder, premeditated murder, do you feel that nothing else appearing that the death penalty is the appropriate punishment?

MR. KIMBROUGH: It would depend --

MR. BREWER: Objection.

THE COURT: Sustained.

MR. GALLOWAY: May I approach the bench?

THE COURT: Yes, sir.

(Side-bar conference was held by the Court, Mr. Brewer, Mr. Galloway, Mr. Currin and Mr. Tolin.

MR. GALLOWAY: Mr. Kimbrough, if the State were to satisfy you and the jury beyond a reasonable doubt that Ricky Price was guilty of first degree murder, would you then be comfortable in requiring the State to show additional aggravating factors according to the Judge's instructions?

MR. KIMBROUGH: According to the Judge's instructions, yes.

MR. GALLOWAY: Okay. Do you feel that it should be necessary for the State to show additional aggravating factors before you would vote to impose the death penalty?

MR. BREWER: Objection.

THE COURT: Sustained. Exception No. 7

MR. GALLOWAY: Mr. Kimbrough, asking you this not to know whether you would follow the Judge's instructions, but to know in the predisposition of your mind, I'll ask you do you feel that the State should be required to show you additional aggravating factors before you would vote to impose the death penalty?

MR. BREWER: Objection.

THE COURT: Sustained. Exception No. 8

MR. GALLOWAY: For the record, I would except and would note that I would propose to ask the same question to all twelve jurors. And in the interest of time if the Court would note that.

Exception No. 9

THE COURT: Let the record so reflect.

MR. GALLOWAY: Thank you.

THE COURT: You may proceed with questioning.

MR. GALLOWAY: Mr. Kimbrough, would

you be comfortable in requiring the State to prove aggravating factors over and above -- strike that. In the second phase, should that phase be reached, would you be comfortable in requiring the State to show aggravating circumstances beyond a reasonable doubt according to the Judge's instructions --

MR. BREWER: Objection.

THE COURT: Sustained. To me it's confusing with the use of the word comfortable.

MR. GALLOWAY: Thank you, Judge. I'll make no comment in open court.

If the State has proven in the second phase -- in the second phase if the State has proven aggravating factors to you beyond a reasonable doubt, do you feel that then it is up to the defendant to prove mitigating factors beyond a reasonable doubt --

THE COURT: Ladies and gentlemen of the jury, the Court will instruct you as to the law. The burden of proof upon the defendant in a second phase is to satisfy the jury concerning mitigating factors. The burden of proof upon the defendant is not to show mitigating factors beyond a reasonable dobut. That is not the law.

You may proceed.

MR. GALLOWAY: Thank you.

to the requirements of the law was impaired by emotional instability."

The sixth factor in mitigation will be: "The capacity of the defendant to conform his conduct to the requirements of the law was impaired by drug abuse."

The seventh factor in mitigation will be: "The capacity of the defendant to conform his conduct to the requirements of the law was impaired by drug-induced mental illness.

The eighth factor in mitigation will be: "The capacity of the defendant to conform his conduct to the requirements of the law was impaired by mixed personality disorder."

Now, other than Number 9, which is any other circumstance or circumstances arising from the evidence which you, the jury, deem to have mitigating factor (sic), are there any other requests for factors in mitigation?

MR. GALLOWAY: If it please the Court, I understand that it has not been submitted to you in written form, we failed to do that as a clerical error, but I am looking at it here in written form, the fact that the defendant has received a life sentence provides additional protection to society. May I

yield to Mr. Tolin who has written this out.

MR. TOLIN: I'm sorry, Your Honor.

That --

COURT REPORTER: I didn't hear a thing you said.

MR. TOLIN: I would -- that's not on the record.

COURT REPORTER: Obviously.

MR. TOLIN: The fact that the defendant has received a life sentence and the fact that this judge may impose an additional life sentence to commence at the expiration of the previous life sentence.

THE COURT: Is that all?

Is that all of the language you are requesting?

MR. TOLIN: Yes, sir.

THE COURT: What I have is "The fact that the defendant has received a life sentence and the fact that this judge --

MR. TOLIN: May impose additional life sentence to commence at the expiration of the previous life sentence provides additional protection to society.

THE COURT: Has that been approved by any court?

MR. TOLIN: No, sir, we have no authority

for that.

THE COURT: Does the State object to that?

MR. BREWER: Just as solidly as we can, Your Honor. I think there's a lot of things in there that have been disapproved.

THE COURT: Objection is sustained.

The Court will submit as Number 9 "Any other circumstance or circumstances arising from the evidence which you, the jury, deem to have mitigating value."

Are there any other requests?

MR. GALLOWAY: Respecting issues?

THE COURT: Factors in mitigation.

Any other requests concerning jury instructions?

MR. BREWER: Your Honor, the State would contend that Number 5 is duplicate of Number 1, emotional disturbance and emotional instability.

THE COURT: Overruled.

Any other requests for instructions?

MR. GALLOWAY: May it please the Court, the pattern instructions regarding Mitigating Factor Number 2, beginning on Page 24, I'd argue that the first two sentences on Page 25 are inappropriate

(Whereupon at 5:05 p.m., September 23, 1987, the trial recessed. At 9:30 a.m., September 24, 1987, the trial continued as follows out of the presence of the jury:)

THE COURT: Madam Clerk, do you have the two envelopes?

THE CLERK: Yes, sir.

THE COURT: Have the jury return.

(Whereupon the following took place in the presence of the jury:)

THE COURT: Good morning, ladies and gentlemen of the jury.

At this time I have in my hands two envelopes, one containing the original issues and recommendation as to punishment form, the other envelope containing the copies.

At this time, Mr. Bailiff, take the two envelopes to the bailiff -- to the foreman, and have the jury return to the jury room to continue your deliberations.

(Whereupon at 9:33 a.m. the jury retired to continue deliberations. At 11:12 a.m. the jury knocked, was returned to the courtroom and the following took place in the presence of the jury:)

THE COURT: Mr. Foreman, has the jury

reached a recommendation as of this time?

THE FOREMAN: No, sir.

THE COURT: Do you have a question for the Court?

THE FOREMAN: Not that I know of.

THE COURT: All right. You had knocked on the door, what do you wish to address to the Court?

THE FOREMAN: Two of the members of the jury stated that --

THE COURT: Now -- now, don't tell me what anyone stated.

THE FOREMAN: Okay. We're hung.

THE COURT: Now, ladies and gentlemen of the jury, I am going to give you a fifteen minute recess at this time. I am going to ask, Mr. Bailiff, if you will collect the copies of the issues and recommendation as to punishment form from the jurors first. We are going to place that in a sealed envelope.

Now, collect the original that will be placed in a sealed envelope.

Now, ladies and gentlemen of the jury, at this time I am going to give you a fifteen minute recess.

During this recess it is your duty do not discuss this case among yourselves or with

anyone else. Do not allow anyone to discuss it with you or in your presence. Form no opinion concerning what your recommendation may be in the case and express no opinion thereto.

If anyone should attempt to contact you in any way concerning this case during this recess, it would be your duty to notify the bailiff or the nearest available member of the Sheriff's Department immediately. Do not read any newspapers. Do not listen to any news broadcasts, and be sure that your juror badge is exposed to the public eye at all times during the recess.

I'll ask that everyone else remain seated as the jury is now excused for thirty minutes -- for fifteen minutes.

(Whereupon the following took place out of the presence of the jury:)

THE COURT: We are now in the absence of the jury. Does anyone wish to be heard?

MR. GALLOWAY: If it please the Court, we would renew our motion that we made for the entry of a life sentence at the close of the evidence the other day on the basis that the evidence fails to establish aggravating factors and on the further basis that the mitigating factors outweigh the aggravating

factors as a matter of law.

Exception No. 167

THE COURT: That is denied.

MR. GALLOWAY: We further move that the Court declare a life sentence in this case due to the inability of the jury to reach a verdict pursuant to the provisions of G.S. 15A-2000 which provides that in the event of the inability of a jury to reach a verdict that the Court shall impose a life sentence. I would point out to the Court and place in the record that the jury went out at approximately 2:55 p.m. yesterday and returned at 5:00. The jury resumed deliberations this morning at approximately 9:30 and returned to the courtroom this morning at approximately 11:20. The foreman stated that "We're hung," which in popular parlance is a statement that the jury is unable to reach a verdict.

THE COURT: The Court will follow this procedure. After the recess, I will instruct the jury basically from 15A-1235 and allow the jury some additional time for deliberations.

Exception No. 168

To this ruling the defendant objects and objection is overruled.

MR. GALLOWAY: Thank you, Your Honor.

THE COURT: All right. We will now be in recess for approximately ten minutes.

Madam Clerk, you will maintain custody of the two envelopes during the recess.

(Whereupon at 11:29 a.m. the trial recessed. At 11:42 a.m. the trial continued as follows out of the presence of the jury:)

MR. GALLOWAY: May it please the Court, I understand the Court is prepared to give an instruction to the jury. I do not know the exact terminology, but we would request that the jurors be instructed that the failure of a jury -- the failure of a juror -- strike that. The Court -- the individual juror should not surrender their own convictions solely in order to reach a verdict. We would ask that they be instructed to that effect during the instructions that you are proposing to give.

THE COURT: I will give an instruction to that effect.

MR. GALLOWAY: Thank you.

THE COURT: As to the use of the word verdict which you have requested, this is a recommendation as to punishment.

MR. GALLOWAY: The word recommendation should be used.

THE COURT: All right. I will allow that.

BF-2084 PENDARVIS, MUNCIE, IN 47302

Madam Clerk, do you have the sealed envelopes?

THE CLERK: Yes, sir.

THE COURT: Have the jury return.

(Whereupon the following took place in the presence of the jury:)

THE COURT: Members of the jury, I am going to ask that you resume your deliberations in an attempt to return a recommendation. I have already instructed you that your recommendation must be unanimous, that is, each of you must agree on the recommendation. I shall give you these additional instructions.

First, it is your duty to consult with one another and to deliberate with a view to reaching a recommendation if it can be done without violence to individual judgment.

Second, each of you must decide the case and your recommendation for yourself, but only after an impartial consideration of the evidence with your fellow jurors.

Third, in the course of your deliberations you should not hesitate to reexamine your own views and change your opinion if you become convinced it is erroneous. On the other hand, you should not

hesitate to hold to your own views and opinions if you remain convinced they are correct.

Fourth, none of you should surrender an honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a recommendation.

Please be mindful that I am in no way trying to force or coerce you to reach a recommendation. I recognize the fact that there are sometimes reasons why jurors cannot agree. Through these additional instructions I have just given you, I merely want to emphasize that it is your duty to do whatever you can to reason the matter over together as reasonable people and to reconcile your differences if such is possible without the surrender of consciencious conviction to reach a recommendation.] Exception No. 169

I will now let you resume your deliberations.

Mr. Bailiff, return the original and copies of the issues and recommendation form as to punishment to the jury and return the jury to the jury room.

THE BAILIFF: Yes, sir.

(Whereupon the following took place out of the presence of the jury:)

to you.

The first aggravating factor presented to you is had the defendant been previously convicted of a felony involving the use of violence to the person; to-wit: the conviction of murder arising out of the death of Joan Brady which occurred on October 18, 1984 in Danville, Virginia.

Now, the State would contend that we have presented evidence to you not only of that conviction by showing you the conviction in Virginia, but also by in the guilt phase showing to you the way in which this murder was carried out. In other words, we proved he committed this murder and proved that he in fact was convicted of that murder in the State of Virginia. So I would argue to you that the State has proven this factor. There is no question about whether the aggravating factor exists. It does exist. The defendant has been convicted of the murder of Joan Brady in Virginia. And I would contend to you that the State has certainly proven this to you beyond a reasonable doubt. And I would contend to you that this reason alone is substantial reason enough to impose the death penalty for the murder of Brenda Leigh Smith. The fact that he had previously, three days before, killed Joan Brady in the State of Virginia.

has been practicing forensic -- or has been practicing psychology for some thirty-five years, since 1952, that certainly that will weigh heavier in your minds than the testimony of Doctor Selwyn Rose.

And remember, the testimony of the people who observed the defendant and who knew him best, they all said that he was normal. They didn't say anything about any mixed personality disorder or didn't indicate that he was manifesting any of the symptoms of that.

Also, remember, ladies and gentlemen, when you are deciding whether any of these mental illnesses or emotional disturbances impair his capacity to conform to the law, that both Doctor Centor and Doctor Rose agree that the defendant is dangerous and is dangerous to others.

Now, the ninth mitigating factor which the State contends to you is -- that you should find no is that the defendant's family has a history of mental illness or emotional disturbance. Now, I would contend to you that there is evidence in this case that the defendant's family or that his mother's family has a history of mental illness. But I would contend to you that just because that is a fact, that his family does, is that a mitigating

by you is or are sufficiently substantial to call for the imposition of the death penalty." Answer, yes or no. And we submit that there should be a separate Issue Five -- I'm sorry. We would submit that if you answer Issue Four "No," then you should put life imprisonment in the final recommendation of punishment. If you do not answer this issue no, then you should consider Issue Five which would be an issue worded such as 15A-2000(c)(3) concerning the weighing of mitigating circumstances.

THE COURT: The Court considers this as a matter that has been subject to extensive appellate review. The court denies the request of the defense. Exception No. 135

Anything further?

MR. TOLIN: No, sir.

THE COURT: Have the jury return.

(Whereupon the following took place in the presence of the jury:)

THE COURT: Jury continues with the State.

MR. BREWER: Thank you, Your Honor.

I talked with you in opening statement about a picture of a scene, picture of a scene of finding a body, the young boy. Talked with you in closing argument to picture a scene of the defendant

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holding a knife to the throat of his uncle. I ask you now, my final speech to you, to picture a scene of a young boy awoke at night by his mother, nine years old, "Robbie, our house is on fire. We've got to get out of the house." Nine year old Robbie Davis in his pajamas and his mother in her pajamas on the same day that Brenda Smith laid strangled to death, had to flee from their homes and when the firemen arrived, but for the smoke detector, you would have seen volunteer firemen of the Pelham Fire Department, big strong men, crying over the death of the lifeless form of a small nine year old child burned to death by this defendant who doesn't care.

[He shows no remorse. He gives no confession. He asks no repentence. He is a stone-cold killer.] Exception No. 13

Now, you are going to hear a lot about the defendant's right to life by Mr. Galloway. You've heard it by Mr. Tolin. [What about the victims' rights? What about the rights of Brenda Smith? We weren't allowed to bring in a lot of her family and a lot of her friends and show you pictures of Brenda Smith while she was alive or to tell you all about her background and what type of person she was and what the value to be placed on her life to society was.] Exception No. 13

No court sat at her execution by the defendant to

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What weight is the fact that he killed before apply to the second killing? It is enormous weight. Joan Brady and Brenda Smith both lie molding in the grave.

There is no question that Joan Brady's death was a previous crime of violence. Had the defendant been previously convicted of a felony involving the use of violence to the person; the conviction of murder arising out of the death of Joan Brady? Absolutely. Uncontroverted. You should unanimously vote on this first issue. And certainly it aggravates the death of Brenda Smith.

Why did he kill Brenda? He admitted on the stand that a month before he talked about the Boston strangler movie where the defendant got off on an insanity defense to Mrs. Barley, Joan Brady's mother. So when Joan kicked him out and he went to Elaine Clay and she said, "You can't move in here," and he decided and formulated a plan to kill Joan Brady, and after he had done so and the days passed, and he realized, "If I kill another one the same way, they are going to think I'm crazy. I've got this long track record, I can use it to my advantage." And so he turns what should be a mitigating factor into an aggravting factor. He turns it into a motive to kill Brenda Smith. His murder of Joan Brady led

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directly to his murder of Brenda Smith. How much more aggravating can that be? But for his argument with Joan Brady, may be he would have cruised on along a little further before he decided to act out this scenario.

Second issue, was this murder a part of a course of conduct in which the defendant engaged, and did that course of conduct include the commission by the defendant of other crimes of violence against Elaine Clay, Robbie Davis, James Hardy and Tony Gammon? If burning a person's house when they're in it is not a crime of violence and the fact it occurred fifteen hours later and it happened to another woman's house who had already told him he couldn't move in, if that's not part of a course of conduct, I don't know what is.

Mr. Tolin says it's not part of a common plan, scheme or design; it's just random violence. This man with all of these mental problems just of all the houses in this State picked out Elaine Clay's house to burn down? Isn't that a course of conduct? Ricky said he had been up to Elaine Clay's house and cut her grass and sprayed her house. He said she was some obscene names. Ricky said he had burned her house to the ground and that her little boy was

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in the house with her when he set it on fire. That's what he told Detective Holley at the hostage scene fifteen hours after the house had burned. If he didn't burn it, there's no way in this world he would have known what happened in Caswell County, North Carolina, when he was in Danville that day. We know he did it. Not only did he do it, he was proud of it. "I burned it to the ground," he says while he's holding a knife to Tony Gammon's throat.

Just like the other day when I said to Mr. Price on the stand, you hurt some guards when you tried to escape from the Danville City Jail, didn't you? "Well, that's putting it mildly. I put eight of them in the hospital." As Doctor Rose says, he is a dangerous man.

The State must prove these two aggravating factors beyond a reasonable doubt. You must agree on them unanimously. I argue to you there is not room for doubt as to the existence of each aggravating factor, and that each of you should find these two aggravating factors exist.

As to the mitigating factors, well, they all revolve around the same thing. They all revolve around his mental or emotional background: Number 1, mental illness or emotional disturbance;

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it," he says. Contradicts his own doctor whose opinion he uses, and you are supposed to use his opinions to help the defendant avoid the death penalty.] Exception No. 141

Doctor Centor says these early things in '74, '76 were misdiagnosed because he was charged with minor matters, and when he came to be charged with murder he was looked at a lot more seriously, and that makes sense. That's the way human beings do things.

Well, ladies and gentlemen, I am going to sit down in just a minute. [You weren't able to protect the life of Joan Brady. You weren't able to protect the life of Brenda Smith. You have a duty. You must discharge it.] Exception No. 142

Jesus says in the Lord's Prayer, "Forgive us our trespasses as we forgive those who trespass against us," [but you have no right under the law. And you may forgive trespasses in your personal life, you may forgive those trespasses, but you have no right as a sworn juror in the State of North Carolina to forgive the trespasses against the State of North Carolina. That is to have no part in your deliberations. You cannot forgive the defendant for what he did to Brenda Smith.] Exception No. 143 And your verdict, be it life or be it death, should be no reflection on any sympathy

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or forgiveness or any religious feelings you have about this case.

No confession. No remorse. (Indicating) He has endangered the life of Elaine Clay and Robbie Davis. [Did he sleep soundly in his bed last night or did he wake up in the middle of the night in a nightmare about fire?] Exception No. 144

The defendant is dangerous. The defendant says in State's Exhibit 10, "I don't care, Babe. Listen Carol, I kill your dumb ass, bitch, whore, whatever." Dangerous. Some girl named Carol. We don't even know who she is. He knows who she was. He told me who she was when I cross-examined him.

It's ironic that on the keys of Brenda Smith was as a joke "Certified Crazy Person" on Brenda Smith's keys. We don't know where she got this, how she came about it. It is a supreme irony that the defendant stands before you at this time acting crazy.

Jerald Inman says he is a very good actor, so that he can avoid the ultimate punishment. In the event that Ricky Price avoids the death penalty, he will remember the jury; he will remember the prosecutors; he'll remember the defense attorneys that didn't get him off; he'll remember the clerk

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and the court --

THE COURT: Objection is sustained.

Ladies and gentlemen, disregard the statement of the District Attorney as to who the defendant would remember.

You may proceed.

MR. BREWER: [You can protect Elaine Clay. You can protect nine-year-old Robbie Davis. You're all they have now.] Exception No. 145 I've done all I can do. Find the truth. Put a verdict down that is one that is wise and one that justifies the crimes involved in this case, one in which you can live with and one in which the defendant has brought upon himself by his cold-blooded contrived, conniving and cruel actions as he tied this girl up and as he put the instrument around her that he choked the life out of her with. And remember how quickly his senses worked to get him away from this scene, from Mr. Wrenn's statement. Remember the people that observed him about the time of this crime.

I thank you, but it's a thankless task that you have. It's a thankless task.

If Your Honor please, those are the arguments for the State of North Carolina.

THE COURT: The jury is now again with

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THE COURT: Court will be at ease awaiting the jury.

(Whereupon at 11:47 a.m. the jury retired to continue deliberations. At 12:45 p.m. the jury knocked, was returned to the courtroom and the following took place in the presence of the jury:)

THE COURT: Mr. Foreman, has the jury reached a unanimous recommendation?

THE FOREMAN: Yes, sir.

THE COURT: You will hand the original of the issues and recommendation as to punishment form to the bailiff. The bailiff will bring it to the Court.

Madam Clerk, you will take the verdict -- you will take the recommendation as to punishment.

THE CLERK: Ladies and gentlemen of the jury, have you agreed upon your recommendation? The recommendation sheet shows that:

"Issue One: Do you unanimously find from the evidence beyond a reasonable doubt the existence of one or more of the following aggravating circumstances? Answer: Yes."

As to the aggravating circumstances, "Number 1: Had the defendant been previously convicted of a felony involving the use of violence to the

person; to-wit: the conviction of murder arising out of the death of Joan Brady which occurred October 18, 1984? Answer: Yes."

"(2) Was this murder part of a course of conduct in which the defendant engaged and did that course of conduct include the commission by the defendant of other crimes of violence against Elaine Clay, Robbie Davis, James Hardy and Tony Gammon? Answer: Yes."

"Issue Two: Do you unanimously find that the evidence of the existence of one or more of the following mitigating circumstances? Answer: Yes."

As to the mitigating circumstances, "Number 1: This murder was committed while the defendant was under the influence of mental illness or emotional disturbance. Answer: No."

"(2) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by low intelligence. Answer: No."

"(3) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by manic-depressive illness. Answer: No."

"(4) The capacity of the defendant

to conform his conduct to the requirements of the law was impaired by schizophrenic illness. Answer: No."

"(5) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by emotional instability. Answer: No."

"(6) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by drug abuse. Answer: No."

"(7) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by drug-induced mental illness. Answer: No."

"(8) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by mixed personality disorder. Answer: No."

"(9) The defendant's family has a history of mental illness or emotional disturbance. Answer: Yes."

"(10) Any other circumstance or circumstances arising from the evidence which you, the jury, deem to have mitigating value. Answer: No."

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"Issue Three: Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you, is or are, insufficient to outweigh the aggravating circumstance or circumstances found by you? Answer: Yes."

"Issue Four: Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you? Answer: Yes."

The recommendation is "We, the jury, unanimously recommend that the defendant, Ricky Lee Price, be sentenced to death."

This is your recommendation, so say you all?

THE COURT: If this is your recommendation, so say you all, raise your right hand.

Let the record reflect that each and every juror has raised his or her right hand.

Now, under the statute, Madam Clerk, you will poll the jury individually.

You will poll them as to their recommendation.

MR. GALLOWAY: We would ask that the entire series of questions be asked, Your Honor.

THE COURT: I will allow that upon your request.

Ladies and gentlemen of the jury, at this time, beginning first with the foreman of the jury, and then each other member of the jury, you will be polled concerning the verdict.

And Madam Clerk, you will, upon request which has been allowed, do it in the same manner individually that you did collectively.

You will stand at the time your name is called. Upon completion, you will then sit.

THE CLERK: David Kimbrough, you as foreman have returned your recommendation as follows: "Issue One: Do you unanimously find from the evidence beyond a reasonable doubt the existence of one or more of the following aggravating circumstances? Answer: Yes."

The aggravating circumstances: "Number 1: Had the defendant been previously convicted of a felony involving the use of violence to the person; to-wit: the conviction of murder arising out of the death of Joan Brady which occurred October 18, 1984? Answer: Yes. (2) Was this murder part of a course of conduct in which the defendant engaged and did that course of conduct include the commission

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by the defendant of other crimes of violence against Elaine Clay, Robbie Davis, James Hardy and Tony Gammon? Answer --"

MR. GALLOWAY: If it please the Court, my request was that each inquiry be asked of the jurors.

THE COURT: That will be allowed.

Madam Clerk, you will do it in this format. As you come to an answer, you will then inquire of the jury as to that specific answer.

THE CLERK: All right.

"Issue Number One: Do you unanimously find from the evidence beyond a reasonable doubt the existence of one or more of the following aggravating circumstances? Answer: Yes." Is this your recommendation?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: Do you still assent thereto?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: Aggravating --

THE COURT: Now, technically until you get to the very last matter which is the recommendation, the question will be: Is this your answer?

As to Issue Number One, is that your answer, that being yes?

MR. KIMBROUGH: Yes, sir.

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THE COURT: And do you still assent thereto?

MR. KIMBROUGH: Yes, sir.

THE COURT: You may proceed.

THE CLERK: Aggravating Factor 1: "Had the defendant been previously convicted of a felony involving the use of violence to the person; to-wit: the conviction of murder arising out of the death of Joan Brady wich occurred October 18, 1984? Answer: Yes." Is that your answer?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: Do you still -- or recommendation?

THE COURT: Answer.

THE CLERK: Answer.

Do you still assent thereto?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: Number 2: "Was this murder part of a course of conduct in which the defendant engaged and did that course of conduct include the commission by the defendant of other crimes of violence against Elaine Clay, Robbie Davis, James Hardy and Tony Gammon? Answer: Yes." Is that your answer?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: Do you still assent thereto?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: "Issue Two: Do you unanimously find from the evidence the existence of one or more of the following mitigating circumstances? Answer: Yes." Is this your answer?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: Do you still assent thereto?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: As to the mitigating factors, "Number 1: This murder was committed while the defendant was under the influence of mental illness or emotional disturbance. Answer: No." Is this your answer?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: Do you still assent thereto?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: "Number 2: The capacity of the defendant to conform his conduct to the requirements of the law was impaired by low intelligence. Answer: No." Is this your answer?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: Do you still assent thereto?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: "Number 3: The capacity of the defendant to conform his conduct to the requirements of the law was impaired by manic-depressive illness. Answer: No." Is that your answer?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: Do you still assent thereto?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: "Number 4: The capacity of the defendant to conform his conduct to the requirements of the law was impaired by schizophrenic illness. Answer: No." Is that your answer?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK; Do you still assent thereto?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: "Number 5: The capacity of the defendant to conform his conduct to the requirements of the law was impaired by emotional instability. Answer: No." Is that your answer?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: Do you still assent thereto?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK; "Number 6: The capacity of the defendant to conform his conduct to the requirements of the law was impaired by drug abuse. Answer: No." Is that your answer?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: Do you still assent thereto?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: "Number 7: The capacity

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of the defendant to conform his conduct to the requirements of the law was impaired by drug-induced mental illness. Answer: No." Is that your answer?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: Do you still assent thereto?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: "(8) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by mixed personality disorder. Answer: No." Is that your answer?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: Do you still assent thereto?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: "(9) The defendant's family has a history of mental illness or emotional disturbance. Answer: Yes." Is that your answer?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: Do you still assent thereto?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: "Number 10: Any other circumstance or circumstances arising from the evidence which you, the jury, deem to have mitigating value. Answer: No." Is that your answer?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: Do you still assent thereto?

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MR. KIMBROUGH: Yes, ma'am.

THE CLERK: "Issue Three: Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you? Answer: Yes." Is this your answer?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: Do you still assent thereto?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: "Issue Four: Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you? Answer: Yes." Is that your answer?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: Do you still assent thereto?

MR. KIMBROUGH: Yes, ma'am.

THE CLERK: Recommendation: "We the jury unanimously recommend that the defendant, Ricky Lee Price, be sentenced to death." Is that your recommendation?

MR. KIMBROUGH: Yes, ma'am.

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THE CLERK: Do you still assent thereto?

MR. KIMBROUGH: Yes, ma'am.

THE COURT: You may be seated.

THE CLERK: Rollie D. Long, "Issue One: Do you unanimously find from the evidence beyond a reasonable doubt the existence of one or more of the following aggravating circumstances? Answer: Yes." Is that your answer?

MR. LONG: Yes.

THE CLERK: Do you still assent thereto?

MR. LONG: Yes.

THE CLERK: Aggravating Factor 1: "Had the defendant been previously convicted of a felony involving the use of violence to the person; to-wit: the conviction of murder arising out of the death of Joan Brady which occurred October 18, 1984? Answer: Yes." Is that your answer?

MR. LONG: Yes.

THE CLERK: Do you still assent thereto?

MR. LONG: Yes.

THE CLERK: "Number 2: Was this murder part of a course of conduct in which the defendant engaged and did that course of conduct include the commission by the defendant of other crimes of violence against Elaine Clay, Robbie Davis, James Hardy and

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

January 11, 1993

Mr. Gordon Widenhouse
PO Box 1070
Raleigh, NC 27602

Re: Ricky Lee Price
v. North Carolina
No. 92-6239

Dear Mr. Widenhouse:

The Court today entered the following order in the above entitled case:

The motion for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of North Carolina for further consideration in light of Morgan v. Illinois, 501 U. S. ------ (1992).

Very truly yours,

William K. Suter

William K. Suter, Clerk

ORIGINAL

Supreme Court, U.S.
FILED
JAN 28 1994
OFFICE OF THE CLERK

No. 93-7348

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

RICKY LEE PRICE,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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No. 93-7348

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

RICKY LEE PRICE,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

The Respondent, the State of North Carolina, by and through its undersigned counsel, the Honorable Michael F. Easley, Attorney General of North Carolina and Special Deputy Attorney General Barry S. McNeill, respectfully opposes and requests this Court to deny the Petition for Writ of Certiorari filed by Petitioner Ricky Lee Price seeking review of the decisions by the North Carolina Supreme Court in State v. Price, 326 N.C. 56, 388 S.E.2d 84, vacated and remanded sub nom., Price v. North Carolina, 498 U.S. 802 (1990), reaff'd in, State v. Price, 331 N.C. 620, 418 S.E.2d 169 (1992), vacated and remanded sub nom., Price v. North Carolina, ___ U.S. ___, 113 S.Ct. 955 (1993),

reaff'd in, State v. Price, 334 N.C. 615, 433 S.E.2d 746 (1993). (P.App. 1-27, 28, 29, 30-39, 40, 41, 42-44, 45)[1]

OPINION BELOW

JURISDICTION

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

Pursuant to Supreme Court Rules 15.2 and 24.2, these items are omitted since the Respondent is satisfied with the Petitioner's statements of the OPINION BELOW, JURISDICTION, and CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED.

STATEMENT OF THE CASE

A. Procedural History

The Petitioner, Ricky Lee Price, was tried at the September 8, 1987 Criminal Session of Person County Superior Court for the first-degree murder of Brenda Leigh Smith in violation of N.C.Gen.Stat. §14-17 (1981). The jury found the Petitioner guilty as charged and a capital sentencing hearing was held pursuant to N.C.Gen.Stat. §15A-2000 (1983). (P.App. 46-47) On September 24, 1987, the jury unanimously recommended that the Petitioner be sentenced to death. (P.App. 48-51, 107-110)

Afterwards, the jurors were polled individually and each one assented to the answers on the "Issues and Recommendation as to

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1 References herein to "P.App. ___" are to the Petitioner's Appendix to his Petition for Writ of Certiorari. References to "T Vol. ___ p ___" are to one of the seven volumes of the trial transcript. References to "R.App. ___" are to the State's Appendix to its Brief in Opposition herein.

Punishment" form as to the finding of aggravating and mitigating circumstances, as well as the unanimous recommendation of the death sentence. (P.App. 110-18) The trial judge then entered the judgment sentencing the Petitioner to death for the first-degree murder of Brenda Leigh Smith.

The Petitioner gave notice of appeal in open court, and the Office of the Appellate Defender was appointed on appeal. The appeal was heard on December 14, 1989, and on February 7, 1990 the North Carolina Supreme Court rendered its opinion unanimously affirming the conviction and death sentence. State v. Price, 326 N.C. 56, 388 S.E.2d 84 (1990); (P.App. 1-27). Pursuant to N.C.R.App.P. 32(b) (1990), the judgment of the North Carolina Supreme Court was certified and entered on the docket on February 27, 1990. (P.App. 28)

On June 27, 1990, the Petitioner filed in the United States Supreme Court and served on the State a Petition for Writ of Certiorari to the Supreme Court of North Carolina, arguing inter alia that the trial court's sentencing instructions violated Mills v. Maryland, 486 U.S. 367 (1988) and the intervening decision in McKoy v. North Carolina, 494 U.S. 433 (1990). Price v. North Carolina, No. 90-5045 (PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA, filed June 27, 1990, at 11-13).

On October 1, 1990, the United States Supreme Court summarily granted certiorari, vacated the judgment of the North

Carolina Supreme Court, and remanded the case "for further consideration in light of McKoy v. North Carolina, 494 U.S. 433 (1990)." Price v. North Carolina, 498 U.S. 802 (1990); (P.App. 29).

On October 3, 1990, the North Carolina Supreme Court ordered the parties to file supplemental briefs limited to the questions of whether there was McKoy error, and, if so, whether such error was harmless beyond a reasonable doubt. State v. Price, 327 N.C. 479, 397 S.E.2d 233 (1990). Following the reargument of the case on April 10, 1991, on June 25, 1992 the North Carolina Supreme Court again unanimously affirmed the Petitioner's death sentence and remanded the case "to the Superior Court, Person County, for further proceedings." State v. Price, 331 N.C. 620, 635, 418 S.E.2d 169, 178 (1992); (P.App. 30-39). Pursuant to N.C.R.App.P. 32(b) (1990), the judgment of the North Carolina Supreme Court was certified and entered on the docket on July 15, 1992. (P.App. 40)

The Petitioner filed his second Petition for Writ of Certiorari on October 13, 1992. Price v. North Carolina, No. 92-6239 (PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA, filed Oct. 13, 1992). On January 11, 1993, the United States Supreme Court summarily granted certiorari, vacated the judgment of the North Carolina Supreme Court, and remanded the case "for further consideration in light of Morgan v.

Illinois, [501 U.S. ___, 112 S.Ct. 2222] (1993)." Price v. North Carolina, ___ U.S. ___, 113 S.Ct. 955 (1993).

Following supplemental briefing, the case was reargued for a third time on May 12, 1993, and on September 10, 1993 the North Carolina Supreme Court again unanimously affirmed the Petitioner's death sentence. State v. Price, 334 N.C. 615, 433 S.E.2d 746 (1993). (P.App. 42-44) Pursuant to N.C.R.App.P. 32(b) (1993), the judgment of the North Carolina Supreme Court was certified and entered on the docket on September 30, 1993. (P.App. 45)

On December 29, 1993, the next-to-last day of the 90-day filing period, Supreme Court Rule 13.1, the Petitioner forwarded his third Petition for Writ of Certiorari [hereinafter "PWC"] to this Court seeking review of the decisions on direct appeal by the North Carolina Supreme Court.

B. **Factual Background**

1. Guilt-Phase Evidence

On Sunday morning, October 21, 1984, at approximately 10:00 a.m., Ann and Tony Wrenn went for a walk with their 13-year-old son, Bryant, in a wooded area near their residence in the Hurdle Mills community of rural Person County, North Carolina. As they were walking, the Wrenns noticed a man in "a squatting position" approximately 45 to 55 feet away. The man suddenly jumped up, picked up a shirt from the ground and fled down the path away from the Wrenns. The man was a white male, and was wearing jeans

but no shirt. The Wrenns both identified the Petitioner as strongly resembling the man they saw in the woods.

As the man went out of sight, the Wrenns discovered that he had been crouched over the lifeless body of a female, later identified as Brenda Leigh Smith. The female victim was lying face down with her head turned to the right, and her hands were bound behind her back with a brown shoestring. An autopsy showed that Brenda died as a result of ligature strangulation. In the forensic pathologist's opinion, the object used around the victim's neck to cause the ligature strangulation "was something broad."

The victim, Brenda Smith, had resided with her parents in Danville, Virginia at the time of her death and had been dating the Petitioner. Brenda worked two jobs--one at a hosiery mill and the other at a local bowling alley. Mary Smith, Brenda's mother, testified that on Saturday, October 20, 1984, soon after Brenda arrived home from working at the bowling alley, the Petitioner telephoned Brenda. Brenda told the Petitioner that she was getting ready to take her mother to the store, but that he could come over to her house. When Mrs. Smith and Brenda returned, the Petitioner was sitting on the couch. The Petitioner had been driving Brenda's car, a blue 1979 Plymouth Horizon. The Petitioner told Brenda that she did not have time to wash her hair because "they had to get on the road." Brenda thereafter changed clothes and told her mother, "Momma, we'll be back after a while. We're going to Greensboro." At approximately 2:30

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evidence relating to the hostage-taking incident at the James Hardy residence and the contemporaneous incriminating statements made by the Petitioner, Darryl Gammon was permitted to testify that while he was at his uncle's residence he heard "a little ruckus going on downstairs." He and his cousin, Irvin Hardy, along with Tony Gammon, his uncle, proceeded downstairs to investigate. In one of the downstairs rooms, they found James Hardy with his hands tied behind his back, his feet also tied, and a gag tied around his mouth. As James Hardy was being untied, the Petitioner emerged from behind a curtain with a flashlight and a knife in his hand. Darryl attempted to restrain the Petitioner with a gun until law enforcement officers could be summoned, but the Petitioner grabbed Darryl's uncle, Tony Gammon, and placed the knife to Tony's throat, threatening "he done killed two and he didn't have nothing to lose. If he killed anybody else, it didn't matter with him." With the knife still at Tony's throat, the Petitioner forced Darryl to surrender the gun or "he was going to kill [Tony] right there in front of [Darryl]." The Petitioner approached Darryl with the knife and backed him through the downstairs basement door. Darryl stepped beside the house, emptied the bullets from his gun, and placed the gun on the patio in front of the Petitioner. The Petitioner picked up the gun, noticed that it was not loaded, and again threatened to kill Tony if Darryl did not furnish him the bullets. According

to Darryl, the Petitioner did not appear to be under the influence of drugs or other intoxicants at the time.

Approximately 6:20 p.m. that evening, Deputy Vic Ingram of the Pittsylvania County Sheriff's Department arrived at the scene and found the Petitioner holding Tony Gammon hostage with a knife to his throat. The Petitioner kept the law enforcement officers at bay for approximately five and a half hours before he finally was subdued and arrested. At the time he was taken into custody, the officers searched and seized from the Petitioner a yellow gold George Washington High School class ring engraved with the name "Brenda Smith" inside, a yellow gold black onyx ring, and a Miller key ring and keys with a metal medallion engraved, "Certified Crazy Person." When the Petitioner saw Deputy Ingram, he warned Deputy Ingram to get back, "that he had already killed two people and that he didn't mind killing one more, that he didn't have anything to lose. And if [Deputy Ingram] came anywhere near him, he would kill [Deputy Ingram] too."

Betty Smith, Brenda Smith's sister, identified the rings and key chain taken from the Petitioner as having belonged to the victim.

During the hostage-taking incident at the James Hardy residence, the Petitioner made a number of incriminating statements, including statements claiming to have previously killed two people and to be good at killing with shoelaces; admitting that he went to Statesville and spent the night with

his girlfriend "the other night"; and, threatening to harm or kill his hostage.

An extensive voir dire hearing was held concerning the admissibility of evidence relating to the Petitioner's similar murder of another former girlfriend, Joan Brady, who was found dead at her residence on Friday afternoon, October 19, 1984. As a result of the trial court's rulings, Susan Pyron was permitted to testify that on Friday afternoon, October 19, 1984 she went to the residence of her sister, Joan Brady, and subsequently called the landlord to unlock Joan's apartment door. When Mrs. Pyron gained entry into the apartment's bedroom, she pulled the covers back from the bed and found Joan Brady's body. Mrs. Pyron described her sister's body as having been face down on the bed, her head turned to the right, with her hands tied behind her back with red shoestrings.

A forensic pathologist testified that Joan Brady also died as a result of ligature strangulation. The broad ligature to Joan Brady's neck was "a soft ligature," approximately seven-eighths of an inch wide.

Jerald Inman, who had been incarcerated with the Petitioner in the Danville City Jail from November of 1984 to July of 1985, testified that the Petitioner admitted killing Brenda Smith and Joan Brady. According to Inman, the Petitioner explained that he had been engaged to marry Brenda Smith, but also was dating Joan Brady and Janice Bates, as well as several other girls, and the

pressure of juggling these relationships "just got to the point where he said he had to eliminate somebody."

2. Penalty-Phase Evidence

Elaine Clay, who had testified during the guilt-phase of the trial concerning the Petitioner's attempt to move in with her and her having seen the Petitioner in Danville on Sunday afternoon, October 21, 1984, was recalled by the State as its first witness at the penalty phase. Ms. Clay, who lived in Pelham, North Carolina, approximately fifteen miles from where she saw the Petitioner that Sunday on Westover Drive in Danville, testified that she and her nine-year-old son were awakened during the early morning hours of October 22, 1984 by the sound of a smoke detector in her house. When they noticed smoke coming from under the basement door, Ms. Clay and her son evacuated the house and drove to the home of a nearby neighbor who called the fire department. The house sustained some structural damage from the fire, including the floor joists below her bedroom.

Investigators determined that the fire's point of origin was a pile of boxes in the basement of Ms. Clay's house, under which was found a partially melted plastic antifreeze container. According to the State's expert, the fire had been set intentionally, not accidentally.

During the hostage-taking incident, the Petitioner made statements indicating that a friend had burned Elaine Clay's house, which he acknowledged was occupied at the time. The

Petitioner referred to Ms. Clay as being "an ugly bitch" and stated that "he should have just killed her himself." In a conflicting statement, the Petitioner was overheard stating he had burned Ms. Clay's house to the ground, and that her little boy was in the house with her at the time. At one point during the hostage negotiations the Petitioner poured the contents of a butane cigarette lighter over his hostage and unsuccessfully attempted to ignite it.

Before resting its case-in-chief at the sentencing phase, the State introduced a judgment from Virginia showing that the Petitioner had been convicted of the Joan Brady murder on May 2, 1985 and received a life sentence.

The first witness for the Petitioner at sentencing was his mother, Cleo Price, who testified regarding his childhood, academic performance, drug use, and hospitalizations for psychological treatment.

The Petitioner took the stand and testified that his early school years were relatively unremarkable. According to the Petitioner, he "made pretty good grades." When he reached the seventh grade, he began "hanging around with [people who] smoked dope and different things." He was "about fifteen years old" when he first was placed in a mental institution. He had stolen a car, and had become disobedient to others, including his parents. During his stay at Dorothea Dix Hospital, he was placed in a management ward and strapped to a bed. He stayed at Dix for

approximately sixteen months and then was hospitalized at the John Umstead Hospital in Butner. Each of his commitments at Butner lasted four to six months. He escaped from Butner during one of his commitments there.

As a result of further legal difficulties, the Petitioner was hospitalized at the Southwestern State Hospital in Marion, Virginia, where he remained for approximately nine months. Because of his disruptiveness during this commitment, he was given a number of physical examinations and tests.

About a month after his last hospitalization, the Petitioner got a job at the mill and bought a car. He moved out of his parents' home and began living with various women. He admitted that he was dating Brenda Smith while he was living with Joan Brady. He also admitted to having been with Brenda on the Saturday and Sunday morning before she died. According to the Petitioner, he had taken LSD that weekend. He last saw Brenda when he allegedly took her to work at the bowling alley in Danville.

On cross-examination, the Petitioner admitted that i
January of 1985, while he was in the Danville City Jail for th
hostage-taking charges and the murder of Joan Brady, he caus
eight jailers to be hospitalized. The Petitioner also admitt
making threats to the psychiatrist who examined him in January
1985. The Petitioner acknowledged his handwriting of a letter
one "Carolyn Johnson" threatening to kill her. The Petiti

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crazy so that he would not go to jail or the electric chair." Dr. Centor felt that the Petitioner was "malingering mental illness" in order to avoid a possible death sentence in North Carolina and also the Virginia charges relating to the hostage-taking. Two other psychiatrists concurred in Dr. Centor's opinion.

Dr. Selwyn Rose, a forensic psychiatrist, also testified as an expert witness for the Petitioner. Dr. Rose disagreed with Dr. Centor's conclusion that the Petitioner was malingering. He explained that the Petitioner had a history of mental illness and that everyone "who has seen this man thought he was psychotic except for Dr. Centor." According to Dr. Rose, the Petitioner has a variety of mental illnesses, which probably increase with his drug-taking. Although a specific diagnosis was difficult, Dr. Rose stated that the Petitioner suffers from "personality disturbances which are quite profound." Dr. Rose agreed that all of the Petitioner's symptoms could be explained with a diagnosis of "mixed personality disorder plus alcohol and substance abuse." Dr. Rose also concurred that the Petitioner had a long-standing adjustment problem; that he had exaggerated his psychiatric symptoms; that he did not suffer from schizophrenia; and that the two major explanations of his mental disorder were an intermittent affective disorder and alcohol and substance abuse. Dr. Rose added that the Petitioner's mental retardation also was a major part of the explanation.

In Dr. Rose's opinion, the Petitioner's mental condition would have impaired his ability to make judgments and control his impulses in October of 1984. The Petitioner's drug abuse, combined with his mental illness and limited intellectual capacity, impaired his ability to make judgments, rational decisions, and control his impulses. The Petitioner suffered from "a very impaired control system" because of his mental illness and history of drug abuse.

On cross-examination, Dr. Rose admitted that the Petitioner had not been completely candid with him, perhaps had lied on occasions, and had exaggerated his mental illness. Dr. Rose conceded that the Petitioner was potentially dangerous when not taking medication.

The Petitioner did indicate to Dr. Rose that he was present when both Joan Brady and Brenda Smith were murdered. Following some minor arguments, the Petitioner slapped Joan twice and she threatened to have him locked up. She then hit his head on the door. He pushed or grabbed her, and threw her onto the bed. She was then strangled, and he tied her hands behind her back after she was dead.

The Petitioner told Dr. Rose that he and Brenda Smith had stopped on the side of the road to find a place to have sex. After they had made love, she wanted something to drink and so they went to a gas station where she called her mother. Following an argument, Brenda came back to the car and was crying. The

Petitioner grabbed her and "played too rough." He stated, "she was lying there dead, I didn't know what to tell her about being married."

REASONS THE WRIT SHOULD NOT ISSUE

I. THE EIGHTH AMENDMENT DOES NOT REQUIRE THAT A CAPITAL DEFENDANT BE PERMITTED TO ARGUE THE SENTENCING JUDGE'S ABILITY TO IMPOSE CONSECUTIVE LIFE SENTENCES SINCE SUCH A FACTOR IS IRRELEVANT TO THE DEFENDANT'S CHARACTER AND RECORD, OR TO THE CIRCUMSTANCES OF HIS OFFENSE.

The Petitioner contends that the trial court's action precluding his defense counsel from arguing to the sentencing jury the potential imposition of consecutive life sentences violated the Eighth Amendment. According to the Petitioner, informing the jurors that the sentencing judge was empowered to impose a life sentence consecutive to another he already was serving would have had mitigating value for a sentence less than death. Therefore, even though such evidence did not relate to either the Petitioner's culpability for the crime or the circumstances of its commission, he believes he should have been allowed to present such evidence under the guise of his constitutional right to put before the jury "any relevant mitigating evidence," citing Lockett v. Ohio, 438 U.S. 586 (1978) and its progeny, including Skipper v. South Carolina, 476 U.S. 1, 4 (1986), quoting, Eddings v. Oklahoma, 455 U.S. 104, 110 (1982), and Penry v. Lynaugh, 492 U.S. 302 (1989). The Petitioner also

maintains that based on Gardner v. Florida, 430 U.S. 349, 362 (1977) (plurality held that defendant was denied due process when the death penalty was imposed, at least in part, on the basis of confidential information which was not disclosed to the defendant or his counsel), he was entitled to argue evidence of the life sentence in response to the State's proffered aggravating circumstance that he previously had been convicted of the Joan Brady murder.[2] On appeal, the North Carolina Supreme Court rejected this claim, holding that such evidence is constitutionally irrelevant to a capital sentencing decision under California v. Ramos, 463 U.S. 992, 1013 n. 30 (1983) ("[many] state courts have held it improper for the jury to consider or to be informed (through argument or instruction) of the possibility of commutation, pardon or parole."). State v. Price, 326 N.C. at 84, 388 S.E.2d at 99-100, reaff'd in, 331 N.C. at 634-35, 418 S.E.2d at 177; (P.App. 16-17, 38). Unable to show that this holding is in conflict with any other state or federal court decisions, the Petitioner resorts to accusing the North Carolina Supreme Court

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2 The due process argument based on Gardner was not seriously developed or argued by the Petitioner on direct appeal to the North Carolina Supreme Court. (R.App. 1-12) Although the Petitioner cited Gardner, his argument focused on (1) whether he should have been entitled to argue the potential imposition of a consecutive life sentence under N.C.Gen.Stat. §84-14 (1985), and (2) whether he had an Eighth Amendment right under Lockett to present and argue such a matter in mitigation. The Petitioner made no specific due process argument under this assignment of error, and the North Carolina Supreme Court did not address such an argument in holding that the effect of consecutive life sentences is irrelevant to a jury's death penalty decision.

of perfunctorily rejecting his claim under "an apparent misunderstanding of Lockett and its progeny." (PWC at 22) However, it is he who strains the limits of Eighth Amendment jurisprudence with this claim.

Before resting its case at the sentencing phase, the State introduced into evidence a Virginia judgment showing that the Petitioner previously had been convicted of the murder of Joan Brady, for which he received a life sentence. The record shows that during the charge conference at the sentencing phase of the trial, defense counsel requested the trial court to submit as one of the mitigating circumstances that the Petitioner previously had received a life sentence, and the trial court could impose an additional life sentence to commence at the expiration of that life sentence which "provides additional protection to society." (P.App. 87) When the trial court inquired if such a mitigating circumstance had been approved by any court, defense counsel replied, "No, sir, we have no authority for that." (P.App. 88-89) The trial court then sustained the State's objection to the proposal. (P.App. 89)

After preliminary sentencing phase arguments, the trial court entered a ruling on the Petitioner's motion to prohibit the prosecutors from arguing the general deterrence of the death penalty. Noting that the first prosecutor had made no reference to general deterrence in his argument, the trial court ordered that the second prosecutor also "not argue at any time before the

jury any theory of general deterrence in connection with the death penalty." (R.App. 13-14) The trial court also prohibited defense counsel from arguing "anything concerning the possibility of parole, the possibility of any other governmental agency taking steps in connection with the sentencing proceeding." (R.App. 14) The State requested that defense counsel further be cautioned not to argue the Petitioner would "spend the rest of his life in prison providing necessary prevention." (R.App. 14) Defense counsel thereafter inquired if the Petitioner was prohibited from making reference to the fact he already was facing a life sentence. (R.App. 14) After reviewing the case law, the trial court ruled that defense counsel could not mislead the jury as to the effect of a life sentence, but that defense counsel could "argue to the jury that the defendant has received a life sentence in Virginia." (R.App. 15) Defense counsel then tendered, for the record, that his argument "would be that the Court has it within its power and discretion to impose a life sentence which would run at the end of the life sentence which the defendant is serving in the State of Virginia." (R.App. 15-16) The trial court clarified that defense counsel "may not argue that to the jury." (R.App. 16) During his closing argument to the jury, however, one of the defense counsel did argue, "I'm not asking you to forgive him. I'm not asking that for a minute. He's already serving a life sentence." (R.App. 17)

As the North Carolina Supreme Court properly held on direct appeal, the trial court's rulings did not prevent the Petitioner from offering relevant mitigating evidence for the sentencing jury's consideration in violation of Lockett and its progeny. The prospect that the Petitioner might face two, consecutive life sentences simply was irrelevant to his character and record, or to the circumstances of his crime.

> That defendant is currently serving a life sentence for another unrelated crime is not a circumstance which tends to justify a sentence less than death for the capital crime for which defendant is being sentenced. Although the sentence comprises part of his formal criminal record and was offered against defendant by the State in the sentencing hearing, "the additional protection to society" possibly achieved by his incarceration under that sentence is not an aspect of defendant's record.

State v. Price, 331 N.C. at 634-35, 418 S.E.2d at 177; (P.App. 38). In California v. Ramos, a majority of this Court specifically refused to override the states providing that capital sentencing juries should not be permitted to consider commutation power. As even the late Justice Marshall emphasized in his Ramos dissent, the "possibility [of eventual release through commutation and parole] bears no relation to the defendant's character or the nature of the crime, or to any generally accepted justification for the death penalty." California v. Ramos, 463 U.S. at 1021 (Marshall, J., dissenting).

Therefore, the Petitioner is incorrect in asserting that no evidence may be deemed irrelevant as possible mitigation.

The Petitioner can point to no state or federal decisions holding that the Eighth Amendment requires the admission of evidence and argument on a sentencing judge's ability to impose consecutive life sentences. Indeed, as this Court noted in footnote 30 of California v. Ramos, 463 U.S. at 1013 n. 30, the propriety of such evidence and argument has been left to the state courts as a matter of state law. The North Carolina Supreme Court correctly recognized this principle in the instant case: "In other words, the Constitution permits such argument or instruction, but it is not constitutionally required." State v. Price, 326 N.C. at 84, 388 S.E.2d at 100 (emphasis original) (P.App. 17), citing, State v. Robbins, 319 N.C. 465, 519, 356 S.E.2d 279, 311, cert. denied, 484 U.S. 918 (1987). As a matter of state law, North Carolina deems that "[a]rgument concerning the effect of consecutive life sentences upon the period of a defendant's incarceration is . . . irrelevant to a determination of his sentence." State v. Price, 326 N.C. at 84, 388 S.E.2d at 100; (P.App. 17). Its decision is of no federal constitutional concern. The Petitioner also has failed to show that the North Carolina Supreme Court's decision is in conflict with other federal or state jurisdictions on this issue.

PUBLISHER'S NOTE:

Page(s) 23 missing in original.

impermissibly coerce the jury to return a death sentence. Lowenfield v. Phelps, 484 U.S. at 237-41.

The Petitioner argues that the trial court's supplemental instructions asking his jury to continue its sentencing deliberations, without explaining the consequences of the jury's inability to render a unanimous recommendation, improperly coerced dissenting jurors to surrender their convictions as to the appropriateness of a life sentence. The North Carolina Supreme Court rejected this claim, holding that in context the trial court only informed the jurors that whatever recommendation they did make had to be unanimous, and that the trial court did not imply that a recommendation must be reached. State v. Price, 326 N.C. at 90-96, 388 S.E.2d at 103-05; (P.App. 20-22). Moreover, the trial court deliberately and carefully stated that it was in no way trying to force the jurors to reach a recommendation and urged them to reconcile their differences only if they could do so without surrendering their conscientious convictions. State v. Price, 326 N.C. at 95-96, 388 S.E.2d at 104-05; (P.App. 21-22). The North Carolina Supreme Court's decision on this issue is consistent with Lowenfield and does not warrant review on certiorari.

At 2:57 p.m. on the afternoon of Wednesday, September 23, 1984, the "Issues and Recommendation as to Punishment" form was delivered to the jury and the jury retired for its sentencing deliberations. At 5:00 p.m., the jury was summoned back to the

courtroom and the trial court interrupted the jury's deliberations for an overnight recess. The jury resumed its sentencing deliberations the next morning at 9:33 a.m., Thursday, September 24, 1987. (P.App. 90) At 11:12 a.m., after three hours and 42 minutes of deliberating, there was a knock on the jury room door and the jury returned to the courtroom. (P.App. 90) The foreman informed the trial court that the jury had not yet reached a recommendation. (P.App. 91) When the trial court inquired if the jury had a question, the foreman replied, "Not that I know of." (P.App. 91) The trial court then asked if the foreman wished to address the court, and the following colloquy transpired:

> THE FOREMAN: Two of the members of the jury stated that--
>
> THE COURT: Now--now, don't tell me what anyone stated.
>
> THE FOREMAN: Okay. We're hung.

(P.App. 91) Out of the presence of the jury, the trial court denied defense counsel's motion to impose a life sentence pursuant to N.C.Gen.Stat. §15A-2000(b) (1983), ruling that the jury should be allowed additional time for deliberations. (P.App. 91-93) However, upon request by defense counsel, the trial court agreed to instruct that the individual jurors should not surrender their own convictions solely in order to reach a verdict. (P.App. 94) The trial court then gave the jury further instructions pursuant to N.C.Gen.Stat. §15A-1235 (1988),

including defense counsel's requested charge on not surrendering one's own convictions in order to reach a unanimous recommendation:

> THE COURT: Members of the jury, I am going to ask that you resume your deliberations in an **attempt** to return a recommendation. I have already instructed you that your recommendation must be unanimous, that is, each of you must agree on the recommendation. I shall give you these additional instructions.
>
> First, it is your duty to consult with one another and to deliberate with a view to reaching a recommendation if it can be done without violence to individual judgment.
>
> Second, each of you must decide the case and your recommendation for yourself, but only after an impartial consideration of the evidence with your fellow jurors.
>
> Third, in the course of your deliberations you should not hesitate to reexamine your own views and change your opinion if you become convinced it is erroneous. On the other hand, you should not hesitate to hold to your own views and opinions if you remain convinced they are correct.
>
> Fourth, none of you should surrender an honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a recommendation.
>
> Please be mindful that I am in no way trying to force or coerce you to reach a recommendation. I recognize the fact that there are sometimes reasons why jurors cannot agree. Through these additional instructions I have just given you, I merely want to emphasize that it is your duty to do whatever you can to reason the matter over together as reasonable people and to reconcile your differences if such is possible without the surrender of conscientious conviction to reach a recommendation.
>
> I will now let you resume your deliberations.

(P.App. 95-96) (emphasis added) At 11:47 a.m., the jury retired to continue its deliberations, and at 12:45 p.m. returned to the courtroom with its recommendation that the Petitioner be sentenced to death. (P.App. 107-110)

The Petitioner claims that the trial court's instructions improperly coerced the jury's death verdict because, unlike in Lowenfield, the trial court failed to inform the jury that a life sentence would be imposed if the jury still was unable to agree on a unanimous recommendation. However, the Petitioner did not request such an instruction at the time, arguing instead that the trial court simply should impose a life sentence pursuant to N.C.Gen.Stat. §15A-2000(b) (1988). (P.App. 93) Moreover, he made no objection to the absence of such an instruction, and sought no correction of the instructions actually given. As in Lowenfield, "such an omission indicates that the potential for coercion argued now was not apparent to one on the spot." Lowenfield v. Phelps, 484 U.S. at 240.

The instructions given by the trial court were a correct statement of the law, and could not reasonably have been misunderstood by the jury. Since the jury did not ask what would happen in the event of a failure to reach a unanimous verdict, the North Carolina Supreme Court properly held that the trial court here was not required to give the instruction recommended in State v. Smith, 320 N.C. 404, 422, 358 S.E.2d 329, 339 (1987) (upon inquiry by the jury as to the requirement of unanimity, the

trial court must inform the jurors that their inability to reach a unanimous verdict should not be their concern but should simply be reported to the court). State v. Price, 326 N.C. at 91-92, 388 S.E.2d at 104-05; (P.App. 21-22). Moreover, any possible misunderstanding or coercive effect that might have resulted from the trial court's instructions was ameliorated by the cautionary admonitions at the end of the supplemental charge. As emphasized above, the trial court admonished the jurors that it "in no way [was] trying to force or coerce" them into reaching a recommendation, and expressly stated that there may be occasions when jurors simply cannot agree. "The effect of this instruction was to make clear to the jurors that they were free to disagree." State v. Huff, 325 N.C. 1, 67, 381 S.E.2d 635, 673 (1989), vacated and remanded on other grounds sub nom., Huff v. North Carolina, 497 U.S. 1021 (1990), remanded for resentencing in, State v. Huff, 328 N.C. 532, 402 S.E.2d 577 (1991). These last words that the jury heard, along with the language that none of the jurors should surrender their honest convictions, must have been understood as authorizing the jury to return with a non-unanimous verdict if they still could not agree after further deliberations.

Such curative instructions distinguish the instant case from the other states' decisions cited by the Petitioner in support of granting review. (PWC at 34-37) For example, in State v. Williams, 392 So.2d 619, 633-35 (La. 1990), which the Petitioner

cites, the jury foreman specifically inquired if the jury's decision had to be unanimous, to which the trial court responded affirmatively. Here, in contrast, the foreman only indicated difficulty reaching a decision. "The instructions were not prompted by a question concerned with the requisite of unanimity." State v. Price, 326 N.C. at 92, 388 S.E.2d at 104; (P.App. 21). More importantly, the trial court did not imply that a recommendation must be reached, and urged the jurors to reconcile their differences only if they could do so without surrendering their conscientious convictions. State v. Price, 326 N.C. at 92, 388 S.E.2d at 104-05; (P.App. 21-22).

Given the content and context of the trial court's supplemental instructions, the Petitioner's case is not in true conflict with other jurisdictions. Accordingly, under these circumstances, the supplemental instructions here did not coerce the jury's sentencing recommendation, and do not warrant review on certiorari.

III. SINCE THE INDIVIDUAL MEMBERS OF THE JURY AFFIRMED THEIR ANSWERS, EITHER UNANIMOUSLY FINDING OR UNANIMOUSLY REJECTING THE MITIGATING CIRCUMSTANCES SUBMITTED, THE ERROR IN THE UNANIMITY REQUIREMENT UNDER MCKOY V. NORTH CAROLINA, 494 U.S. 433 (1990) WAS HARMLESS BEYOND A REASONABLE DOUBT AND DOES NOT WARRANT REVIEW ON CERTIORARI.

The Petitioner argues that the trial court's sentencing instructions, directing the jury to consider only mitigating circumstances found unanimously, improperly limited the jury's

consideration of possible mitigation in violation of the intervening decision by this Court in McKoy v. North Carolina, 494 U.S. 433 (1990). In McKoy, a majority of this Court held that, under Mills v. Maryland, 486 U.S. 367 (1988), North Carolina's express unanimity requirement for the finding of mitigating circumstances unconstitutionally limits the sentencing jury's ability to consider mitigating evidence. On remand, the North Carolina Supreme Court unanimously held that the McKoy error in the Petitioner's case was harmless beyond a reasonable doubt because the trial court's polling of each individual juror showed that the jury was unanimous in rejecting the non-found mitigating circumstances. State v. Price, 331 N.C. at 623-28, 418 S.E.2d at 171-74; (P.App. 32-35). The Petitioner now contends that certiorari review is warranted because the North Carolina Supreme Court "applied an incorrect harmless error analysis given the fundamental nature of the constitutional error in this capital case." (PWC at 38) According to the Petitioner, a reasonable juror may have understood the polling inquiry to be whether his answer was "No" because the jury as a whole was not unanimous as to the existence of a particular mitigating circumstance, and therefore the polling process did not prove the absence of McKoy error or that any such error was harmless. However, unlike McKoy, here the record clearly shows that the sentencing jury unanimously did reject all but one of the

mitigating factors submitted for its consideration, and therefore the McKoy error properly was held to be harmless.

In Mills, both the majority and the dissent accepted as constitutional a system which requires unanimity both to accept and reject factors in mitigation. Writing for the majority in Mills, Justice Blackmun observed: "[i]f the jury understood the verdict form as the [Maryland] Court of Appeals asserted it should have, then every time it marked 'no' beside a mitigating circumstance it indicated its unanimous conclusion that petitioner had not proved the relevant facts by a preponderance of the evidence, and thus the court properly upheld the judgment." Mills v. Maryland, 486 U.S. at 376. The majority concluded that the sentencing instructions and the verdict form together could not, with any degree of certainty, be read to reach this saving construction "that the 'no' answer, like the 'yes' answer, must be unanimous." Mills v. Maryland, 486 U.S. at 377-78. There was no "extrinsic evidence of what the jury in this case actually thought." Mills v. Maryland, 486 U.S. at 381. See also McKoy v. North Carolina, 494 U.S. at 455 n. * ("It is no surprise that the majority in Mills assumed such a scheme [requiring jury unanimity for presence or absence of a mitigating factor] would be constitutional.") (Kennedy, J., concurring); McKoy v. North Carolina, 494 U.S. at 459 n. 1 (Scalia, J., dissenting).

Here, contrary to the Petitioner's argument, there is "extrinsic evidence" that the jury did unanimously reject all but

one of the mitigating circumstances submitted for its consideration. When the jury returned with its sentencing recommendation in open court (P.App. 107-10), the trial court allowed defense counsel's request that the jurors be polled on each of the questions answered on the Issues and Recommendations form, including the individual juror's answers to the 10 mitigating factors. (P.App. 110-12) During the subsequent polling of the jury, each of the 12 jurors indicated unanimous rejection of all but the sole mitigating factor that the Petitioner's family has a history of mental illness or emotional disturbance (mitigating factor no. 9). (P.App. 112-18) (T Vol. VII pp 2090-2153) There was absolutely no evidence of any disagreement among the individual jurors as to the existence or non-existence of the mitigating factors, despite the opportunity during the polling procedure for the expression of such dissent.

The North Carolina Supreme Court expressly rejected the Petitioner's contention that a reasonable juror might have understood the polling to refer to the jury's answers as a whole, rather than whether he or she individually assented to the answers as announced or wished to change his or her answers.

> A reasonable juror would understand that if she were being questioned individually, the question was referring to her as an individual juror. The very purpose of the poll is to ascertain each juror's individual vote on the issue or issues in question. We are confident the jurors here did not understand it to be otherwise.

These facts raise a spectre of coercion from the supplemental instructions. Once the trial court had given these supplemental instructions, the jury deliberated for just over three-fourths of an hour before returning a recommendation of death. The jury's returning with its sentencing recommendation "soon after receiving the supplemental instruction . . . suggests the possibility of coercion." *Lowenfield*, 484 U.S. at 240; *United States v. United States Gypsum Company*, 438 U.S. 422, 462 (1978). A critical distinction exists, however, between the challenged instruction below and the one given in *Lowenfield*.[7] In *Lowenfield*, the trial court began its supplemental instruction by explaining, "As I instructed you earlier if the jury is unable to unanimously agree on a recommendation the Court shall impose the sentence of Life Imprisonment . . . ." *Id.* at 235. Thus, the jury in *Lowenfield*, unlike petitioner's jury, not only knew the effect of a deadlock but also realized *it was permissible* to fail to reach a unanimous sentencing recommendation. The trial court never told petitioner's jury it could fail to reach a unanimous sentencing recommendation, that the jury could "hang." Despite finding the supplemental instruction in Lowenfield not coercive, this Court recognized the potential problem. It limited the scope of *Lowenfield* as follows:

> By so holding we do not be understood as saying other combinations of supplemental charges and polling may not require a different conclusion. Any criminal defendant, and especially any capital defendant, being tried by a jury is entitled to the uncoerced verdict of that body.

Id. at 241. The court below rejected this argument on the merits. [App. 22] *Price*, 326 N.C. at 90-93, 388 S.E.2d at 103-05. The court essentially deferred to the trial court's discretion as to whether supplemental instructions were appropriate. *Id.* at 92-93, 388

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[7] Furthermore, defense counsel in *Lowenfield* failed to object to the supplemental instruction, unlike the present case. *Lowenfield v. Phelps*, 484 U.S. 231, 240 (1988). This Court found "such an omission indicate[d] that the potential for coercion argued now was not apparent to one on the spot." *Id.* On the contrary, the "potential for coercion" was readily apparent to those "on the spot" in the present case.

room. This question referred "to the present in-court state of mind of the juror and serve[ed] only to emphasize by repetition that the crucial assent is the juror's assent to the verdict when he returns to the courtroom." State v. Asbury, 291 N.C. 164, 170, 229 S.E.2d 175, 178 (1976). By the clerk asking if the juror continued to assent to each of the negative findings of the nine mitigating circumstances, the juror would have understood such questioning to be whether he or she, individually, agreed with the answer or wished to express a different one. In assenting, the juror, in effect, was stating for the record that he or she, individually, found and agreed that the Petitioner had failed to prove by a preponderance of the evidence the nine rejected mitigating circumstances.

The Petitioner similarly ignores the import of the trial court's notation on the record following the polling procedure. After all 12 of the jurors had been polled, the trial court stated:

> Let the record reflect that the clerk has individually polled each juror at which time each juror in a positive manner stated that this was his or her answer to each of the issues and the recommendation of death and that he or she still assents thereto. The polling being unanimous, the Court orders that the issues and recommendation as to punishment form be recorded by the clerk.

(R.App. 18-19) (emphasis added) Clearly, the trial court made it a matter of record that the polling procedure had afforded the jurors the opportunity to confirm their personal answers to the

sentencing issues and recommendation, including the non-found mitigating circumstances, but none had expressed any individual disagreement with the jury's answers as recorded on the Issues form and announced in open court. Therefore, as the North Carolina Supreme Court held, all facets of the polling procedure reinforced the reasonable belief by the jurors that the questions and answers were directed to them as individuals jurors--not the entire jury.

In addition to the Petitioner's case, the North Carolina Supreme Court has found similar jury polling to render McKoy error harmless in two other cases, State v. Allen, 331 N.C. 746, 747, 417 S.E.2d 227, 227 (1992), cert. denied, ___ U.S. ___, 113 S.Ct. 1402, reh'g denied, ___ U.S. ___, 113 S.Ct. 1885 (1993); and, State v. Laws, 328 N.C. 550, 554-56, 402 S.E.2d 573, 576-77, cert. denied, ___ U.S. ___, 112 S.Ct. 216, reh'g denied, ___ U.S. ___, 112 S.Ct. 627 (1991). But see State v. Lloyd, 329 N.C. 662, 665-68, 407 S.E.2d 218, 220-22 (1991) (distinguishing Laws on bases that individual jurors were polled only as to the final sentencing decision and polling questions did not reveal whether jury's rejection of the mitigating circumstances was unanimous). As the North Carolina Supreme Court suggested in State v. McKoy, 327 N.C. 31, 44 n. 4, 394 S.E.2d 426, 433 n. 4 (1990), McKoy error also has been found to be harmless in two other categories of cases: (1) where the defendant offered no mitigating evidence at sentencing, and none of the evidence presented would have

supported the finding of a mitigating circumstance, State v. Hunt, 330 N.C. 501, 515-17, 411 S.E.2d 806, 813-14, cert. denied, ___ U.S. ___, 112 S.Ct. 3045 (1992); and, (2) where the jury found all of the mitigating circumstances submitted, State v. Roper, 328 N.C. 337, 368-70, 402 S.E.2d 600, 618-19, cert. denied, ___ U.S. ___, 112 S.Ct. 280 (1991).

For the first time in any court, brief, or petition, the Petitioner now suggests that certiorari is warranted on the issue of whether McKoy error ever may be harmless, citing this Court's analytical framework of "trial" and "structural" errors identified in Arizona v. Fulminante, 499 U.S. ___, ___, 111 S.Ct. 1246, 1265 (1991).[4] However, "[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court." Youakim v. Miller, 425 U.S. 231, 234 (1976) (per curiam), quoted in, Taylor v. Freeland & Kronz, ___ U.S. ___, ___, 112 S.Ct. 1644, 1649 (1992). See also Berkemer v. McCarty, 468 U.S. 420, 443 (1984)

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4 The Petitioner has not questioned the availability of harmless error analysis in any of the following: in briefing or at argument on his initial direct appeal of the Mills/McKoy issue to the North Carolina Supreme Court, (R.App. 20-21); in his first certiorari petition to this Court, Price v. North Carolina, No. 90-5045 (PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA, filed June 27, 1990, at 11-13), or in his reply brief, (REPLY TO BRIEF IN OPPOSITION, filed Sept. 19, 1990, at 2-5); in his supplemental briefing or at argument on remand to the North Carolina Supreme Court for further consideration in light of McKoy, (R.App. 22-44); or, in his second certiorari petition to this Court, Price v. North Carolina, No. 92-6239 (PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA, filed Oct. 13, 1992, at 37-45), or in his reply brief, (REPLY TO BRIEF IN OPPOSITION, filed Dec. 29, 1992).

Although the decisions from other jurisdictions on this issue are not unanimous, *e.g., People v. Kimble*, 44 Cal. 3rd 4809, 244 Cal. Rptr. 148, 749 P.2d 803 (1988); *Romine v. State*, 256 Ga. 521, 250 S.E.2d 446 (1986), the weight of authority supports petitioner's position. The division among the states demonstrates, at the very least, the need for this Court's intervention in this important issue. The potentially coercive effect of an *Allen*-type charge in the sentencing phase of a capital case recognized in *Lowenfield* is a risk the Eighth Amendment will not permit. If a single juror agreed to the sentencing recommendation reached here because of the erroneous impression that unanimity was required, that juror was the difference between life and death for petitioner. In a case of jury deadlock, the exacting standard of reliability demanded in capital sentencing proceedings offsets any concern the state might have with juror abdication. Given the division of authority among the highest courts of a number of jurisdictions on this important issue to capital proceedings, review of this question is in order.

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if given the chance, take the easy way out and fail even to try to reach agreement" as to a sentencing recommendation.

> The process of death qualification, the jurors' oath, and the trial court's instructions are all designed to assure that the jury will make a conscientious attempt to follow the law in reaching its verdict. The entire system of capital punishment depends on the belief that a jury representing the conscience of the community will responsibly exercise its guided discretion in deciding who shall live and who shall die. To hide from the jury the full range of its sentencing options, thus permitting its decision to be based on uninformed and possible inaccurate speculation, is to mock the goals of rationality and consistency required by modern death penalty jurisprudence.

Id. Indeed, North Carolina's Chief Justice long ago reached a similar conclusion. "I believe the instruction would inform the jury that it cannot escape the task of recommending a sentence. Whatever it does some sentence will be imposed as a result." *State v. Johnson*, 298 N.C. 355, 378, 259 S.E.2d 752, 766 (1979) (Exum, J., dissenting). Unfortunately, the court below does not follow this advice.

Court's judgment in State v. Allen, 331 N.C. at 747, 417 S.E.2d at 227. Allen v. North Carolina, ___ U.S. ___, 113 S.Ct. 1402 (certiorari denied, but Justices Blackmun, O'Connor, and Souter would have granted petition and reversed the judgment), reh'g denied, ___ U.S. ___, 113 S.Ct. 1885 (1993). However, none of the three Justices indicated which of the three issues presented in the certiorari petition in Allen v. North Carolina, No. 92-6584 (PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA, filed Nov. 12, 1992), prompted their dissent from the Court's denial of certiorari. Therefore, in view of the unanimous prior denial of certiorari in Hunt v. North Carolina on this very issue, it is disingenuous for the Petitioner to insinuate that review somehow is now more likely or appropriate in light of the dissenters from the denial of certiorari in Allen v. North Carolina.

Although Clemons v. Mississippi, 494 U.S. 738 (1990) dealt with whether a death sentence based, in part, on invalid or improperly defined aggravating circumstances nevertheless could be upheld if the error was harmless beyond a reasonable doubt, the same harmless error analysis applies equally to sentencing instructions which restrict the consideration of mitigation evidence or mitigating circumstances. Indeed, four Justices, including Justice O'Connor, previously have expressed the view, in their dissent from the remand of a North Carolina case for reconsideration in light of McKoy, that McKoy error is subject to

harmless error analysis. McNeil v. North Carolina, 494 U.S. 1050 (1990) (Kennedy, J., dissenting, and joined by Chief Justice Rehnquist, Justice O'Connor, and Justice Scalia) (issue whether unanimity requirement "may have been harmless due to failure to present mitigating evidence" remained open for examination on remand) (emphasis added). This Court also alluded to the availability of harmless error where sentencing instructions improperly precluded the jury from considering non-statutory mitigating circumstances. Hitchcock v. Dugger, 481 U.S. 393, 399 (1987) (failure to consider non-statutory mitigating circumstances warranted reversal, in part, because government "made no attempt to argue that this error was harmless"). See e.g., Demps v. Dugger, 874 F.2d 1385, 1388 n. 12 (11th Cir. 1989) (harmless error analysis is appropriate for Hitchcock violation), cert. denied, 494 U.S. 1090 (1990).

Therefore, it is not surprising that the North Carolina Supreme Court has held McKoy error to be amenable to harmless error analysis. As Chief Justice Rehnquist recently observed, "[t]here is a 'strong presumption' that any error will fall into [the category of trial errors which may be quantitatively assessed and are amenable to harmless error analysis]." Sullivan v. Louisiana, 508 U.S. ___, ___, 113 S.Ct. 2078, 2083 (1993) (Rehnquist, C.J., concurring), quoting, Rose v. Clark, 478 U.S. 570, 579 (1986). "Thus, it is the rare case in which a constitutional violation will not be subject to harmless-error analy-

sis." Sullivan v. Louisiana, 508 U.S. at ___, 113 S.Ct. at 2083, citing, Arizona v. Fulminante, 499 U.S. at ___, 111 S.Ct. at 1254, 1263-64 (listing examples of trial and structural errors). As this Court has intimated, and the lower court consistently have held, McKoy error is amenable to harmless error analysis since it epitomizes classic "trial error," which quantitatively may be assessed in the context of other mitigating evidence presented in order to determine whether the possible exclusion of mitigating circumstances by the unanimity requirement was harmless beyond a reasonable doubt.

In essence, McKoy error hypothetically precludes individual jurors from considering and giving effect to mitigating circumstances not unanimously found by the jury. See Satterwhite v. Texas, 486 U.S. 249 (1988) (harmless error rule applied to admission of evidence at the sentencing stage of capital case in violation of Sixth Amendment counsel clause). Since the Eighth Amendment does not require that a jury even make the factual findings necessary for imposing the death penalty, see Cabana v. Bullock, 474 U.S. 376 (1986), it follows that an appellate court should be free to make the harmless error determination whether the McKoy error would not have influenced the sentencing jury to recommend life.

In contrast, McKoy error is markedly different from "structural defects" which have been held not subject to harmless error analysis because they affect "the framework within which the

trial proceeds, rather than simply an error in the trial process itself." Arizona v. Fulminante, 499 U.S. at ___, 111 S.Ct. at 1263-64, citing, Gideon v. Wainwright, 372 U.S. 335 (1963) (total deprivation of right to counsel), Tumey v. Ohio, 273 U.S. 510 (1927) (judge who was not impartial), Vasquez v. Hillery, 474 U.S. 254 (1986) (unlawful exclusion of members of the defendant's race from grand jury), McKaskle v. Wiggins, 465 U.S. 168 (1984) (right to self-representation at trial), and, Waller v. Georgia, 467 U.S. 39 (1984) (right to public trial). Likewise, the Petitioner's reliance on Gray v. Mississippi, 481 U.S. 648 (1987), in which this Court held that harmless error analysis is not applicable to the improper excusal for cause of a juror for opposition to the death penalty, is misplaced since "the impartiality of the adjudicator goes to the very integrity of the legal system." Gray v. Mississippi, 481 U.S. at 668. McKoy error is not "so basic to a fair trial [or sentencing] that [it] can never be treated as harmless error." Chapman v. California, 386 U.S. 18, 23 (1967).

Under these circumstances, the Petitioner's McKoy claim is unique to the facts of his case and does not present any important federal questions worthy of this Court's attention. The result reached by the North Carolina Supreme Court on this issue does not conflict with this Court's harmless error cases, or any lower courts. Accordingly, this Court should not issue its writ of certiorari.

IV. IN VIEW OF THE BROAD-RANGING VOIR DIRE QUESTIONING WHICH WAS PERMITTED, THE PETITIONER WAS NOT DENIED DUE PROCESS OF LAW IN VIOLATION OF MORGAN v. ILLINOIS, 501 U.S. ___, 112 S.Ct. 222 (1992) WHEN THE TRIAL COURT PREVENTED THE PETITIONER FROM QUESTIONING A PROSPECTIVE JUROR CONCERNING HIS "FEELING" ON THE NORTH CAROLINA REQUIREMENT THAT ADDITIONAL AGGRAVATING CIRCUMSTANCES MUST BE PROVEN TO JUSTIFY A SENTENCE OF DEATH; MOREOVER, THE NORTH CAROLINA SUPREME COURT PROPERLY HELD THAT ANY ERROR UNDER MORGAN WAS HARMLESS BEYOND A REASONABLE DOUBT.

The Petitioner argues that the trial court placed "undue restrictions" upon his voir dire of potential jurors, thereby preventing him from ascertaining whether the jurors could follow the law with respect to the capital sentencing procedure in violation of this Court's recent decision in Morgan v. Illinois, 501 U.S. ___, 112 S.Ct. 2222 (1992). (PWC at 52) During the jury voir dire, the following colloquy occurred between defense counsel and prospective juror David M. Kimbrough:

> MR. GALLOWAY: Mr. Kimbrough, if the State were to satisfy you and the jury beyond a reasonable doubt that Ricky Price was guilty of first degree murder, would you then be comfortable in requiring the State to show additional aggravating factors according to the Judge's instructions?
>
> MR. KIMBROUGH: According to the Judge's instructions, yes.
>
> MR. GALLOWAY: Okay. Do you feel that it should be necessary for the State to show additional aggravating factors before you would vote to impose the death penalty?
>
> MR. BREWER: Objection.
> THE COURT: Sustained.

A reasonable likelihood arose from these unconstitutional instructions that an individual juror would understand that *her* answer to a specific mitigating circumstance must be "No" *unless the entire jury agreed* that this mitigating circumstance was proved by a preponderance of the evidence. *See Boyde v. California*, 494 U.S. 370 (1990). In the context of the entire charge, a reasonable juror would be hard pressed to understand the challenged instructions to mean that a negative finding of a particular mitigating factor would not be *her* answer if the jury could not unanimously agree that the mitigating factor existed. "Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the way lawyers might. [A] common sense understanding of the instructions in light of all that has taken place at the trial is likely to prevail over technical hairsplitting." *Id.* at 329. This "common sense" understanding is particularly appropriate in this case where an individual juror was responding to a question without opportunity for deliberation or discussion with respect to its meaning.

The trial court instructed the sentencing jury on at least ten occasions that it *must* answer "No" to a mitigating circumstance if the jury did not agree unanimously as to its existence. There was no suggestion that any individual juror could have a different ultimate answer to a particular mitigating circumstance than the answer of the jury. There could be only one answer for the entire jury. A reasonable juror would have understood this instruction to mean that the jury's negative answer and, hence, her negative answer to any particular circumstance depended on the absence of a unanimous agreement that the circumstance had been proved by a preponderance of the evidence. If a juror so understood the instructions, then *her individual* answer to a mitigating circumstance would be "No" if the jury failed to agree unanimously as to the existence of this circumstance. Under these conditions, an individual juror's assent to the "No" answer during the poll would simply indicate her agreement that the jury failed to find this circumstance unanimously, not that *she* would have failed to find it if she

> their ability to follow the court's instruction in regard to these circumstances and apply the law according to the instructions. This should have enabled the defendant to determine whether to challenge a juror on the ground he would automatically vote for the death penalty if the defendant was found guilty.

State v. Price, 334 N.C. at 618, 433 S.E.2d at 747-48; (P.App. 43-44).[6]

Given the otherwise broad-ranging voir dire questioning which was permitted, even under Morgan the North Carolina Supreme Court properly held that the error, if any, was harmless beyond a reasonable doubt. Moreover, though not necessary to the decision below, there was no Morgan error since the questioning by defense counsel was sufficient to satisfy the Petitioner's right under Morgan to make the requisite inquiry for possible bias. Therefore, the facts of this case are distinguishable from Morgan.

In Morgan, a majority of this Court held that "Petitioner was entitled, upon his request, to inquiry discerning those jurors who, even prior to the State's case-in-chief, had predetermined the terminating issue of his trial, that being whether to impose the death penalty." Morgan v. Illinois, 501 U.S. at

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6 Contrary to the Petitioner's representation in his petition, the North Carolina Supreme Court did not find that Morgan error occurred during jury voir dire. (PWC at 56) Justice Webb, writing for a unanimous court, did not decide whether there was Morgan error, since the court agreed that even assuming there was Morgan error, the error was harmless beyond a reasonable doubt. State v. Price, 334 N.C. at 618, 433 S.E.2d at 747-48; (P.App. 43-44).

___, 112 S.Ct. at 2233. However, in Morgan, the trial court conducted the voir dire of the prospective jurors rather than the attorneys. The trial court refused defense counsel's request to ask all prospective jurors if they found Morgan guilty, would they automatically vote to impose the death penalty regardless of the facts. This Court agreed that the trial court's general "follow the law" questioning of the prospective jurors was not sufficient to satisfy Morgan's right to make inquiry for biased jurors, and such restrictions upon Morgan's inquiries rendered his trial fundamentally unfair.[7] Morgan v. Illinois, 504 U.S. at ___, 112 S.Ct. at 2232-35.

A review of the jury voir dire here confirms that, unlike Morgan, the trial court did not unconstitutionally limit the Petitioner's right to make inquiry for biased jurors. Initially, it should be noted that in North Carolina, unlike Illinois, the attorneys rather than the court conduct the majority of the voir

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7 In Morgan, this Court cited State v. Rogers, 316 N.C. 203, 216-18, 341 S.E.2d 713, 722 (1986) as recognizing a capital defendant's right to question prospective jurors about their views on the death penalty so as to insure a fair and impartial verdict. Morgan v. Illinois, 501 U.S. at ___ n. 4, 119 L.Ed.2d at 500 n. 4. The trial court in Rogers prohibited voir dire questioning about whether the prospective juror could conceive of circumstances wherein she would impose a life sentence rather than the death penalty and whether she automatically would vote for the death penalty if the jury found the defendant guilty. The North Carolina Supreme Court held that there was no abuse of discretion in the trial court's limitation of such questioning, noting that a review of the voir dire showed that the defendant "was clearly afforded an opportunity to question each juror on his or her death penalty views." State v. Rogers, 316 N.C. at 218, 341 S.E.2d at 722.

This Court has had occasion many times in the past to answer questions about the jury's deliberations in the sentencing phase of a capital case so that, among other things, the structure of capital sentencing hearings would permit full consideration of mitigating evidence and so that the actors in the system - be they jurors or judges - would be free to play the roles they have been assigned in such hearings. The Eighth and Fourteenth Amendments require no less. As this case demonstrates, there are still more questions to be answered.

The members of the jury in this case were unconstitutionally instructed that they could not consider and give effect to whatever evidence they deemed to have mitigating value unless all of the jurors agreed that such evidence had mitigating value. The state appellate court then found that this error was harmless based on a misreading of the results of a jury poll. No one ever heard from the individual jurors in this case an answer to the question of how they would have voted - life or death - if they had been allowed to do what the Constitution requires that they are free to do, i.e., to consider mitigating circumstances that fewer than all of the jurors thought had been established by a preponderance of the evidence.

The flaw of the unanimity rule, as found by this Court in McKoy, is the deprivation of a defendant's right to have each juror, individually, weigh such mitigating circumstances as he or she deems established against such aggravating circumstances as are proved by the state, and then vote individually on life or death. This flaw was not avoided for the Petitioner by a mere polling to ascertain whether the foreman reported correctly on unanimity, for it is the unanimity requirement itself that is the flaw. This Petitioner, no less than petitioner McKoy, is entitled to a new penalty trial.

In Clemons v. Mississippi, 494 U.S. 738 (1990), this Court held that it was constitutionally permissible for state appellate courts to engage in harmless error analysis in an effort to determine "whether beyond a reasonable doubt the result would have been the same" if a particular aggravating circumstance had not been erroneously defined in the jury instructions.

Citing Clemons, and without further analysis, the North Carolina Supreme Court held in McKoy, 394 S.E.2d at 433, that harmless error analysis was equally applicable to improper jury instructions in the sentencing phase of a capital case that restrict the ability of individual jurors to consider and give effect to mitigating evidence. This Court should decide whether such a broad reading of Clemons is appropriate when the constitutional defect at issue encroaches upon the jury's

from asking the prospective jurors the automatic imposition of the death penalty question.

On several occasions during the voir dire questioning, the Petitioner's defense counsel attempted to explain and emphasize that in order to return a recommendation of a death sentence the jury would have to consider and find aggravating circumstances above and beyond the fact that the Petitioner had committed a first-degree murder. (R.App. 45-46, 50, 52) The trial court also instructed the prospective jurors on the procedure for returning a death sentence recommendation. (R.App. 49, 53-54) At one point during the voir dire, after the State's objections to similar questions had been sustained, defense counsel was permitted to ask at least six of the prospective jurors if they "could require the State to prove aggravating factors over and above first degree murder before [they] would vote for the death penalty." (R.App. 55-56) On other occasions, defense counsel was permitted to inquire if the jurors felt that a death sentence was the only appropriate punishment for a conviction of first-degree murder. (R.App. 57, 58, 59-60, 61-62, 63, 64, 65, 66, 67, 69, 71, 72, 73-74) Later in the jury voir dire, defense counsel asked if the jurors would require the State to show and prove aggravating factors before voting to impose the death penalty. (R.App. 68, 70, 71, 72, 75-76)

Therefore, unlike in Morgan, defense counsel here was allowed to question the prospective jurors on these general prin-

ciples of law, and fully explored this area for bias with potential jurors as the jury voir dire progressed. In fact, as to juror Kimbrough, the Petitioner's defense counsel was allowed to ask and Kimbrough answered without objection that he would "be comfortable in requiring the State to show additional aggravating factors according to the Judge's instructions." (P.App. 84-85) Earlier, Kimbrough was asked and answered that he would consider mental or emotional disturbance as a mitigating factor to weigh against the State's aggravating circumstances. (R.App. 77-80) Kimbrough also indicated that he could follow the trial court's sentencing instructions, and that he felt that he fully understood the instructions. (R.App. 81) Under these circumstances, the questions which defense counsel propounded to Kimbrough and others were sufficient under Morgan to allow the Petitioner to exercise intelligently his challenges for cause against possibly biased jurors who might automatically impose the death penalty after a finding of guilt. As this Court continued to recognize in Morgan, "[t]o be constitutionally compelled . . . it is not enough that such questions might be helpful. Rather, the trial court's failure to ask these questions must render the defendant's trial fundamentally unfair." Morgan v. Illinois, 504 U.S. at ___ n. 5, 112 S.Ct. at 2230 n. 5, quoting, Mu'Min v. Virginia, 500 U.S. ___, ___, 111 S.Ct. 1899, 1905 (1991).

If the trial court's ruling restricting the voir dire questioning violated Morgan, the error, if any, was harmless beyond a

320 n.14 (1979) ("[F]ailure to instruct a jury on the necessity of proof of guilt beyond a reasonable doubt can never be harmless error") (citing Cool v. United States, 409 U.S. 100 (1972); Cf. Taylor v. Kentucky, 436 U.S. 478 (1978)).

These principles are especially important where "there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences." Caldwell v. Mississippi, 472 U.S. 320, 330 (1985), see Luginbuhl, Comprehension of Judges' Instructions in the Penalty Phase of a Capital Trial: Focus on Mitigating Circumstances, 16 Law & Hum. Behav. 203, 214-15 (1992) (improper unanimity instruction effectively prevents consideration of mitigating circumstance "by a juror who thought that it existed by a preponderance of the evidence.") Such a bias against consideration of mitigating evidence was the very reason this Court voided the unanimity instruction given in the sentencing phase of petitioner's trial, see McKoy, 494 U.S. at 439-40, and it is simply impossible now to determine what effect that bias had on the jury's deliberations in this case. "[T]he evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer." Satterwhite, 486 U.S. at 258.

The decision in Clemons is not to the contrary. In that case, this Court found that a constitutionally defective instruction concerning one of three aggravating circumstances found by the jury might constitute harmless error if it were

possible to determine beyond a reasonable doubt that "the result would have been the same" had that aggravating circumstance been properly defined in the jury instructions. Clemons, 494 U.S. at 754. This case related solely to definition of the "heinous, atrocious and cruel" aggravating circumstance and had nothing to do with the way in which the jury was to approach their deliberations on mitigation. See Pensinger v. California, 112 S.Ct. 351 (1991) (noting that the jury instruction in Clemons "did not alter the mix of evidence weighed by the jury at the penalty phase.")

It is one thing to decide that invalidation of one of three aggravating circumstances found by the jury constitutes harmless error, although this Court refused to accept that conclusion on the record before it in Clemons. It is quite another to announce that McKoy error had no effect on the decision-making processes of the twelve persons in the jury room, a question on which there is not and cannot be any record evidence.

This Court has been presented with this question in a previous request to review a decision of the Supreme Court of North Carolina. Although review was denied, three justices dissented and would have vacated the judgment in that case. Allen v. North Carolina, 113 S.Ct. 1402, 1403 (1993)(Justices Blackmun, O'Connor, and Souter would grant the petition and reverse the judgment). The identical polling process relied upon below to find McKoy error harmless had been used in Allen. Review of this harmless error analysis is in order now.

43-44). Therefore, the state court did "rigorously engage in harmless error analysis before denying relief," (PWC at 52 n. 11), and Brecht, which authorizes a less-stringent harmless error standard on federal habeas review, does not bring into question the North Carolina Supreme Court's direct appeal analysis.

No fundamental unfairness comparable to Morgan occurred in the Petitioner's jury voir dire, and this case does not present a certiorari worthy issue.

V. THE PROSECUTOR'S ARGUMENT COMMENTING ON THE PETITIONER'S ABSENCE OF REMORSE WAS APPROPRIATE UNDER THE CIRCUMSTANCES, AND DID NOT CONTRAVENE FUNDAMENTAL CONSTITUTIONAL PROTECTIONS OF DUE PROCESS OF LAW OR RISK AN UNRELIABLE DEATH SENTENCE UNDER THE EIGHTH AMENDMENT SUCH AS TO RAISE AN IMPORTANT ISSUE WARRANTING CERTIORARI.

The prosecutor, in his closing argument to the jury during the sentencing phase of the trial, commented that the Petitioner had showed no signs of remorse and had not confessed[9] to the murder of Brenda Smith. (P.App. 99-100, 105) Despite the brevity of these remarks and his own failure to object, the Petitioner contends that the exploitation of his failure to express

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9 In his petition, the Petitioner suggests that he did confess, as illustrated by the witnesses who testified to his incriminating statements. (PWC at 62) However, when the Petitioner testified during the sentencing phase he expressly denied both murders of Joan Brady and Brenda Smith. (R.App. 93) Presumably, when the prosecutor commented about the absence of a confession he was referring to the Petitioner's continuing denial of the killings despite the substantial evidence to the contrary, including the Petitioner's own admissions to his forensic psychiatrist that he in fact was present when both Joan Brady and Brenda Smith were murdered. (R.App. 94-95)

remorse at sentencing contravenes fundamental constitutional protections of due process of law under Griffin v. California, 380 U.S. 609 (1965) and risks an unreliable death sentence in violation of the Eighth Amendment. Specifically, he argues that such remarks violated his right to plead not guilty and to require the State to prove its case. Asserting that this important issue is likely to recur in capital proceedings and that a conflict exists among the jurisdictions which have addressed the question, the Petitioner urges this Court to grant certiorari.

The North Carolina Supreme Court rejected this same argument, reaffirming its previous holding in State v. Brown, 320 N.C. 179, 358 S.E.2d 1, cert. denied, 484 U.S. 970 (1987) that "although remorselessness is not a statutory aggravating circumstance and may not be argued as such, see, e.g., Brown, 320 N.C. at 199, 358 S.E.2d at 15, we noted in that case and we note again here that the State never cited this characteristic as an aggravating circumstance to the jury either verbally or on the verdict sheet." State v. Price, 326 N.C. at 85, 388 S.E.2d at 100, citing, State v. Brown, 320 N.C. at 199-200, 358 S.E.2d at 15-16; (P.App. 17). The court also held that "calling the jury's attention to an absence of perceptible remorse does not unconstitutionally 'exploit' a defendant's silence at trial or his unwillingness to admit guilt." State v. Price, 326 N.C. at 85, 388 S.E.2d at 100, citing, State v. Artis, 325 N.C. 278, 327, 384 S.E.2d 470, 498 (1989), vacated and remanded on other grounds

[PROSECUTOR]: Objection.

THE COURT: Sustained.

[DEFENSE COUNSEL]: May I approach the bench?

THE COURT: Yes, sir.

[UNRECORDED SIDE-BAR.]

[DEFENSE COUNSEL]: Mr. Kimbrough, if the State were to satisfy you and the jury beyond a reasonable doubt that Ricky Price was guilty of first degree murder, would you then be comfortable in requiring the State to show additional aggravating factors according to the Judge's instructions?

[PROSPECTIVE JUROR]: According to the Judge's instructions, yes.

[DEFENSE COUNSEL]: Okay. Do you feel that it should be necessary for the State to show additional aggravating factors before you would vote to impose the death penalty?

[PROSECUTOR]: Objection.

THE COURT: Sustained.

[DEFENSE COUNSEL]: Mr. Kimbrough, asking you this not to know whether you would follow the Judge's instructions, but to know in the predisposition of your mind, I'll ask you do you feel that the State should be required to show you additional aggravating factors before you would vote to impose the death penalty?

[PROSECUTOR]: Objection.

ing jury since they necessarily relate to the defendant's character. See Lockett v. Ohio, 438 U.S. 586, 604 (1978). It follows that a defendant's absence of remorse also should be a proper consideration for the jury in determining whether the defendant is deserving of a death sentence. See Payne v. Tennessee, 501 U.S. ___, ___, 111 S.Ct. 2597, 2608-09 (1991) (Eighth Amendment does not per se prohibit capital sentencing jury from considering "victim impact" evidence relating to the victim's personal characteristics and the emotional impact of the murder on the victim's family, or preclude a prosecutor from arguing such evidence at a capital sentencing hearing); California v. Ramos, 463 U.S. 992, 1001-09 (1983) (instruction permitting capital sentencing jury to consider Governor's power to commute a life sentence without possibility of parole is not unconstitutionally prohibited; invites jury to assess whether defendant is someone whose probable future behavior makes it undesirable that he be permitted to return to society); Jurek v. Texas, 428 U.S. 262, 276 (1976) (Stevens, J.) ("What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine."); Gregg v. Georgia, 428 U.S. 153, 203-04 (1976) (joint opinion) (desirable to allow open and far-ranging argument that places as much information as possible before the sentencing jury). As noted in Payne, this Court "'has deferred to the State's choice of substantive factors relevant to the penalty determination.'" Payne

v. Tennessee, 501 U.S. at ___, 111 S.Ct. at 2608, quoting, California v. Ramos, 463 U.S. at 1001. As with victim impact evidence, a defendant's lack of remorse "is simply another form or method of informing the sentencing authority about the . . . [character of the defendant and his/her moral culpability and blameworthiness], evidence of a general type long considered by sentencing authorities." Payne v. Tennessee, 501 U.S. at ___, 111 S.Ct. at 2608.

Here, the Petitioner took the stand and testified at the sentencing phase of his trial, describing his childhood, family history and past commitments to mental institutions. On cross-examination, the Petitioner denied that he had killed either Joan Brady or Brenda Smith (R.App. 93), even though his own forensic psychiatrist subsequently informed the sentencing jury that the Petitioner had admitted to him being present when both girlfriends were murdered. (R.App. 94-97) Therefore, the facts of this case are not comparable to Lesko v. Lehman, 925 F.2d 1527, 1540-45 (3rd Cir.), cert. denied, ___ U.S. ___, 112 S.Ct. 273 (1991), the primary federal case on which the Petitioner relies to suggest there is a "significant division of authority" on this issue.

In Lesko, the defendant Lesko also testified at the penalty phase of his Pennsylvania capital murder trial, primarily concerning his deprived childhood and family background, but Lesko did not testify as to the merits of the charges against him, and

he was not cross-examined by the prosecution. On federal habeas review, Lesko challenged comments made by the prosecutor in his closing argument that Lesko had taken the witness stand, but "he didn't even have the common decency to say I'm sorry for what I did," and that it was the jury's "duty" to even the "score," which stood at "John Lesko and Michael Travaglia two, Society nothing." Lesko, 925 F.2d at 1540. Lesko argued that the prosecutor's remarks about his failure to express remorse constituted a comment on his assertion of his Fifth Amendment privilege against self-incrimination, in violation of Griffin v. California. Pennsylvania countered that such comments should not be considered an improper comment on Lesko's failure to testify since Lesko did in fact testify at the penalty phase. In addition, Pennsylvania characterized the remarks as an appropriate "exhortation to the sentencing jury to consider Lesko's demeanor." Lesko, 925 F.2d at 1541. The Third Circuit agreed that the Griffin rule is applicable to both the guilt and sentencing phases of a capital trial, but held that a capital defendant "does not completely waive his Griffin rights by testifying at the penalty phase solely on mitigating factors that are wholly collateral to the merits of the charges against him." Lesko, 925 F.2d at 1541-42, 1543 n. 15, distinguishing, Tucker v. Francis, 723 F.2d 1504, 1508-14 (11th Cir.) (by testifying at penalty phase on merits of charges, defendant waived right to preclude prosecutor from commenting on defendant's failure to testify

during guilt phase), vacated for reh'g en banc, 728 F.2d 1358 (11th Cir. 1984), reinstated in relevant part, 762 F.2d 1496 (11th Cir. 1985) (en banc), cert. denied, 478 U.S. 1022 (1986). Since Lesko's penalty phase testimony about his childhood, family background, and schooling did not bear a tangential relationship to the substance of the charges against him, his limited testimony did not constitute a waiver of his right under Griffin to be free from prosecutorial comment about his failure to testify and rebut the merits of the prosecution's case.

In contrast to Lesko, the Petitioner here did testify not only to biographical mitigating factors, but also was cross-examined extensively about the substance of the charges, including both murders. Therefore, although the Third Circuit went on to hold that the prosecutor's comment about Lesko's failure to express remorse "constituted an impermissible comment on Lesko's failure to testify on the merits" in violation of Griffin v. California, Lesko, 925 F.2d at 1544-45, Lesko is inapplicable to the present case. Even assuming under Lesko the applicability of Griffin to the sentencing phase, the Petitioner waived any Griffin rights against prosecutorial comment on matters reasonably related to his credibility or the subject matter of his testimony, including remarks about his absence of remorse. See also Kennedy v. Dugger, 933 F.2d 905, 913-15 (11th Cir. 1991) (where prosecutor's remarks were confined to defendant's penalty phase testimony, scope of defendant's waiver of right to remain

silent at penalty phase of capital murder prosecution was broad enough to permit prosecutor to comment that defendant did not indicate his state of mind), cert. denied, ___ U.S. ___, 112 S.Ct. 957, reh'g denied, ___ U.S. ___, 112 S.Ct. 1518 (1992). Moreover, Lesko also is distinguishable because the Third Circuit granted habeas relief based on the cumulation of the Griffin violation, along with the prosecutor's "appeal to vengeance" comments. Lesko, 925 F.2d at 1546-47.

In addition to the Eleventh Circuit's decisions in Tucker and Kennedy, the Fourth Circuit has found no constitutional impropriety in a prosecutor arguing at sentencing that a capital defendant had shown no remorse. Gaskins v. McKellar, 916 F.2d 941, 951 (4th Cir. 1990) (state prosecutor's argument during sentencing phase of capital murder trial, to effect that defendant had shown no remorse, did not constitute improper comment on defendant's refusal to testify during guilt phase of trial, where comment was directed toward defendant's anticipated sentencing argument and fact he had shown no remorse for previous murders of which he had been convicted, which had been introduced as aggravating factors), cert. denied, ___ U.S. ___, 111 S.Ct. 2277, reh'g denied, ___ U.S. ___, 112 S.Ct. 14 (1991). See also, Resnover v. Pearson, 965 F.2d 1453, 1465 (7th Cir. 1992) (prosecutor's comments regarding defendant's refusal to be present in courtroom during penalty phase were not comments on defendant's refusal to testify).

The several state cases cited by the Petitioner for the conflicting proposition that it is improper to use a defendant's failure to express remorse against him in a capital sentencing proceeding also fail to show that certiorari review is warranted. All of the cases are decisions of state law, and do not purport to construe the Due Process Clauses of the Fifth and Fourteenth Amendments, or apply Eighth Amendment analysis. Moreover, Owen v. State, 656 S.W.2d 458, 459-60 (Tex. Crim. App. 1983) (en banc) and People v. Coleman, 80 Cal.Rptr. 920, 459 P.2d 248, 254 (1969) are distinguishable in that both involved defendants whose trial testimony at the guilt phase was followed by prosecutorial comments at the penalty phase condemning the defendants' lack of remorse, whereas here the Petitioner testified at the sentencing phase. Similarly, State v. Sloan, 298 S.E.2d 92, 95 (S.C. 1982) merely supports the proposition that a prosecutor may not urge a jury to consider a defendant's plea of not guilty as evidence that the defendant lacked remorse. In Pope v. State, 441 So.2d 1073, 1077-78 (Fla. 1983), the Florida Supreme Court held that a defendant's lack of remorse may not be considered in support of or to enhance the aggravating circumstance of especially heinous, atrocious or cruel. At most, these decisions reflect the various choices of these respective states as to the appropriateness of commenting on a capital defendant's lack of remorse, see Payne v. Tennessee, 501 U.S. at ___, 111 S.Ct. at 2608, and do not

represent a true conflict on an important issue of constitutional law.

Therefore, the prosecutor's sentencing phase comment on the Petitioner's lack of remorse was not constitutional error. The prosecutor's brief remarks on the Petitioner's lack of remorse otherwise were proper, did not infect the sentencing proceedings with fundamental unfairness, and likewise did not undermine the reliability of the Petitioner's death sentence. The North Carolina Supreme Court's decision on this issue does not warrant review on certiorari.

CONCLUSION

For the reasons discussed above, the Petitioner has failed to identify any state or federal cases which are in conflict with the decision by the North Carolina Supreme Court affirming his conviction of first-degree murder and death sentence. This Court's review of that decision is not warranted, and therefore the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 585 A 87 **NINTH DISTRICT**

SUPREME COURT OF NORTH CAROLINA

****

STATE OF NORTH CAROLINA)
) **From Person**
v.)
)
RICKY LEE PRICE)

****

DEFENDANT-APPELLANTS BRIEF

****

FILED
JUL 21

XIV. **THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN PRECLUDING DEFENDANT FROM ARGUING THE SENTENCING JUDGE'S ABILITY TO RUN CONSECUTIVELY A LIFE SENTENCE RECOMMENDED BY THE JURY TO THE LIFE SENTENCE PRESENTLY BEING SERVED BY DEFENDANT IN VIRGINIA AND FROM ARGUING THE PERIMETERS OF ANY POSSIBLE PAROLE ON A LIFE SENTENCE IMPOSED FOR FIRST-DEGREE MURDER IN NORTH CAROLINA, AS THESE ARGUMENTS WERE A PROPER EXPLANATION OF THE LAW AND THEIR EXCLUSION PREVENTED DEFENDANT FROM HAVING THE JURY CONSIDER LEGITIMATE REASONS FOR THE IMPOSITION OF A SENTENCE LESS THAN DEATH, THEREBY DEPRIVING HIM OF HIS CONSTITUTIONAL RIGHTS TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT.**

Assignment of Error No. 44, Rp. 73
Exception No. 132, Tp. 1992
Exception No. 134, Tp. 1994

Immediately preceding defendant's arguments to the jury during the punishment phase of this case, the trial court made two important rulings. First, he precluded defense counsel from arguing "anything concerning the possibility of parole" to the jury. (Tp. 1992) Second, he rejected defense counsel's proffer of an argument to the jury that the trial judge was empowered to impose a life sentence, if recommended by the jury, which would run at the end of the life sentence defendant was presently serving in Virginia. (Tp. 1994)[13] The eighth amendment requires, at a minimum, that defendant be afforded the opportunity to present relevant mitigating evidence to the sentencer and to have the sentencer consider this evidence in its determination of punishment. *E.g., Eddings v. Oklahoma,* 455 U.S. 104 (1982); *Lockett v. Ohio,* 438 U.S. 586 (1978). Furthermore, the legislature has determined the jury may consider any other circumstance arising from the evidence which it deems to have mitigating value. *See*

[13]The state had introduced evidence, of its own accord, of defendant's conviction for first-degree murder in Virginia and the imposition of a life sentence thereon. (Tp. 1565)

N.C. Gen. Stat. §15A-2000(f)(9). Quite plainly, preventing defense counsel from arguing the legal effect of a life sentence in North Carolina with respect to parole eligibility and from arguing the law regarding the potential imposition of consecutive life sentences ran completely counter to this basic eighth amendment and statutory principle. Since the trial court's rulings prevented defendant from having the jury consider legitimate bases for the imposition of a sentence less than death, the punishment imposed in this case cannot stand. Accordingly, defendant must receive a new sentencing hearing.

A. The Applicable Law.

The sentencer in a capital case may "not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Equally clear is the corollary rule that the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.' " *Skipper v. South Carolina,* 476 U.S. 1, 4 (1986) (citations omitted) (quoting *Eddings,* 455 U.S. at 110, 114). These rules are "well established," *Skipper, id.,* and "beyond dispute." *Mills v. Maryland,* 100 L.Ed.2d 384, 393 (1988). In *Eddings,* the Oklahoma death penalty statute permitted the defendant to present any evidence regarding potentially mitigating circumstances. 455 U.S. at 115 n.10. The North Carolina statute is similarly broad, as the catchall provision permits the jury to consider "[a]ny circumstance arising from the evidence which the jury deems to have mitigating value." N.C. Gen. Stat. §15A-2000(f)(9). As *Eddings* cogently explained, once the legislature permits consideration of any of a myriad of circumstances as might form the basis for a sentence less than death, "Lockett requires the sentencer to listen." *Id.* While the sentencer remains free to

weigh prospective mitigation, the mitigation may not be given no weight by the virtue of its exclusion from the sentencer's consideration. *Id.* at 115.

The gist of this argument rests upon the trial court's action in precluding defense counsel from arguing legitimate matters of evidence and applicable legal principles that might serve as a basis for a sentence less than death. Such a ruling

> that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

Lockett, 438 U.S. at 605. It is beyond peradventure that *Lockett* and its progeny prohibit statutes, evidentiary rulings, and jury instructions that preclude the sentencer from considering "factors which may call for a less severe penalty." It is abundantly clear that the trial court's restrictions upon defense counsel's closing arguments ran afoul of this constitutional prohibition. As the Supreme Court noted in *Skipper*, it is of no moment that the proffered evidence related neither to defendant's culpability for the crime nor to the circumstances surrounding the crime itself. "Although it is true that any such inferences would not relate specifically to petitioner's culpability for the crime he committed, there is no question but that such inferences would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than death.' " *Skipper*, 476 U.S. at 4-5 (citations omitted).

The actions of the trial court also violated the well-settled rule in this jurisdiction permitting counsel to argue the law as well as the facts of a case to the jury. This statute simply provides: "In jury trials the whole case as well of law as a fact may be argued to the jury." N.C. Gen. Stat. §84-14; *see State v. Murray*, 310 N.C. 541, 313 S.E.2d

523 (1984); *State v. Hardy*, 299 N.C. 445, 263 S.E.2d 711 (1980). The statutory predecessor to this provision was adopted by the legislature in response to the nineteenth century practice of the trial courts in this state to curtail closing arguments that departed from strict adherence to the facts of the case. To remedy this problem, "the Legislature passed an act allowing counsel to argue both the law and the facts to the jury." *State v. Miller*, 75 N.C. 73, 74 (1876). The judicial interpretations of this provision are unequivocal. For example, a defense lawyer must be permitted to read to the jury statutory provisions prescribing the punishment for the crime charged. It is reversible error to prohibit counsel from doing so in closing argument. *E.g., State v. Irick*, 291 N.C. 480, 213 S.E.2d 833 (1977); *State v. McMorris*, 290 N.C. 286, 225 S.E.2d 553 (1976). An attorney is permitted to read a statute relevant to his case, but simply must avoid incorrectly stating the law or misleading the jury. *E.g., State v. Britt*, 285 N.C. 256, 204 S.E.2d 817 (1974). This Court has recently reaffirmed the basic principle allowing counsel "to argue the law to the jury which includes the authority to read and comment on reported cases and statutes." *State v. Gardner*, 316 N.C. 605, 611, 342 S.E.2d 872, 876 (1986).

B. Improper Restriction Of Argument Concerning Consecutive Life Sentences.

As noted previously, the prosecution was permitted to introduce, over defendant's objections, the language of the Virginia judgment rendered in the Joan Brady case. This included language that "Ricky Lee Price is hereby sentenced to confinement in the penitentiary of this Commonwealth for life under Indictment One for murder . . . ." (Tp. 1565) Once the prosecution was permitted to introduce this evidence to support one of its submitted (and eventually found) aggravating circumstances, defendant was entitled to offer evidence calculated to mitigate its

possible effect, *Skipper*, 476 U.S. at 5, or to rebut it altogether. *Gardner v. Florida*, 430 U.S. 349, 362 (1977). As part of this effort, defendant proposed to argue to the jury the applicable law in North Carolina with respect to concurrent and consecutive sentences.

During a colloquy between the trial court and counsel for both sides, outside the presence of the jury, defendant made the following proffer:

> My argument to the jury would be that the Court has it within its power and discretion to impose a life sentence which would run at the end of the life sentence which the defendant is serving in the State of Virginia.

(Tp. 1994) At that juncture, the trial court told defense counsel "you may not argue that to the jury." (Tp. 1994) This limitation was erroneous.

In the first place, this proposed argument was an accurate statement of the statutory law in North Carolina and was not misleading to the jury. The applicable statute provides:

> When multiple sentences of imprisonment are imposed on a person at the same time or when a term of imprisonment is imposed upon a person who is already subject to an undischarged term of imprisonment, including a term of imprisonment in another jurisdiction, the sentences may run either concurrently or consecutively, as determined by the Court.

N.C. Gen. Stat. §15A-1354(a). Furthermore, the mitigating effect of consecutive sentences is obvious when further resort is had to the law in this jurisdiction. "When it is a consecutive sentence, it commences to run when the State has custody of the defendant following completion of the prior sentence." N.C. Gen. Stat. §15A-1355(a). The meaning of these two statutory provisions are clear and unmistakable. The trial court was empowered to run a life sentence recommended by defendant's jury consecutively to the life sentence he was presently serving in Virginia, a fact about

which his jury was already aware. Furthermore, the jury would doubtlessly conclude that if it recommended a life sentence for defendant in the case *sub judice* and the trial court ran it consecutively to the Virginia life sentence, then the life sentence recommended in this case would begin *only* after the Virginia life sentence had expired.

The trial court's ruling was erroneous in two respects. First, it impermissibly precluded defendant from exercising his right to argue the applicable law to the jury. Once the jury knew he was serving a life sentence imposed in another jurisdiction, the potential for consecutive life sentences became relevant. Once this potentiality became relevant, section 15A-1354 became applicable, and defense counsel was entitled to read it and argue its effect to the jury. Under the plain language of section 84-14 and the interpretive decisions of this Court, the trial court stripped defendant of an important statutory right.

The prejudicial effect of this error is best understood by considering the second way in which the trial court erred. Its ruling prohibited defendant from exercising his constitutional right to have the jury consider relevant facts and circumstances that might lead it, as the sentencer in a capital case, to fix punishment at something other than death. As *Lockett* and its progeny make clear, precluding the sentencer from considering any relevant evidence that might serve as a basis for a sentence less than death offends basic eighth amendment principles.

Certainly, the prospect that defendant might face two, consecutive life sentences, the second of which could only begin at the expiration of the first, might lead the sentencer in this case to fix punishment at something less than death. Defendant was almost thirty-years old at the time of his trial. As noted below, under the applicable provisions for a life sentence in North Carolina, he would not even be eligible for parole until he has served at least twenty years on his North Carolina sentence. *See*

N.C. Gen. §15A-1371. In combination with a preceding Virginia life sentence, defendant's jury could be more assured of his continued confinement away from members of society for an extremely long period of time. These inferences, wholly consistent with and reasonably inferable from the law applicable to this case, could easily serve as a basis for a sentence less than death.

To the extent that this Court determines that the fatal flaw in the trial court's ruling with respect to the argument about the potential consecutive nature of the two life sentences, defendant has satisfied his burden of showing that a different result might likely have been reached had this error not been committed. He has demonstrated the error was not harmless. *See* N.C. Gen. Stat. §15A-1443(a). Even if the Court determines that a statutory violation has not occurred, defendant has certainly demonstrated constitutional error. On these facts, the state simply cannot satisfy this Court that this constitutional error was harmless beyond a reasonable doubt.

C. Improper Restriction Of Argument Concerning Parole Eligibility.

During the same colloquy noted above, the trial court placed another restriction on defendant's closing arguments. He told defense counsel they "may not argue anything concerning the possibility of parole, the possibility of executive clemency, the possibility of any other governmental agency taking steps in connection with the sentencing proceeding." (Tp. 1992) This restriction offended both the statutory entitlement to argue the applicable law to the jury and the constitutional opportunity to have the sentencer consider mitigation that might serve as a basis for a sentence less than death. For both of these reasons, the trial court also erred in placing this restriction upon defendant.

As a statutory matter, if defendant received a life sentence for first-degree murder in North Carolina, he would not actually be *eligible* for parole consideration until serving at least twenty years in prison. N.C. Gen. Stat. §15A-1371. Defendant should have been permitted to argue this law to the jury. It is certainly not misleading in terms of establishing the minimum amount of time defendant would have to serve before becoming eligible for parole if his jury had recommended a life sentence. As other applicable statutes make clear, once given a life sentence for first-degree murder, defendant would not be entitled to any credit for good behavior or gain time in an effort to accelerate his parole eligibility. *See, e.g.*, N.C. Gen. Stat. §15A-1355(c) (no credit for good behavior available to persons sentenced to life in prison for first-degree murder, a Class A felony); N.C. Gen. Stat. §148-13(c) (credit for good behavior not applicable to persons sentenced to life in prison for first-degree murder, a Class A felony); N.C. Gen. Stat. §148-13(d) (persons convicted of a Class A felony, *e.g.*, first-degree murder, not included under provisions creating gain time). Defendant should certainly have been permitted to argue these statutory provisions to the jury as they were applicable to the evidence and issue before it, that is, the appropriate punishment to be imposed.

The importance of making the argument prohibited by the trial court cannot be overstated. Unquestionably, the public holds gross misconceptions about the actual effect of imposing a life sentence in a case involving a conviction for first-degree murder. Seventy percent of the American people believe that a person given a life sentence will not remain incarcerated for the remainder of his life. Bennack, *The Public, the Media, and the Judicial System: A National Survey of Citizen's Awareness*, 7 No.4 State Ct. J. 4, 10 (1983). A recent study in Georgia revealed the average juror thought a murderer given a life sentence would be *released* in seven or eight years. Codner, "The Only Game in Town: Crapping Out in Capital Cases Because of Juror

Misconceptions About Parole" 47-50 (unpublished paper, University of Michigan School of Law, 24 January 1986). In general terms, this recognition hinges on the notion that a life sentence does not mean a life sentence.

In addition to these general, wide-scale statistics, limited studies conducted in particular cases have confirmed the misconceptions harbored by jurors about people in capital cases. Paduano & Smith, *Deathly Errors: Juror Misconception Concerning Parole in the Imposition of the Death Penalty*, 18 Col. Human Rights L. Rev. 220-25 & nn.34, 35 (1987). In three cases, post-sentence surveys were done of the sentencing jurors or the trial venire. The results were exceedingly consistent and strikingly alarming. They revealed two critical facts. First, jurors consistently underestimated the time a person must serve on a life sentence for first-degree murder before becoming eligible for parole. In two Georgia cases, the vast majority of jurors felt this time period was only seven years rather than the twenty-five years. In Mississippi, the overwhelming majority felt the time period was only five to ten years. Second, in both Georgia cases, two-thirds of the jurors indicated that they would have been more likely to sentence the particular defendant to a life sentence had they been informed that he would have to spend at least twenty years in prison prior to becoming eligible for parole. In the Mississippi case, two-thirds of the jurors indicated they would be more likely to give a life sentence if they knew that the person would never be eligible for parole. *Id.*

Recently, the Maryland Court of Appeals concluded that a defendant facing the death penalty should be allowed to place before the sentencing jury relevant and competent evidence concerning his eligibility for parole should a life sentence be granted. *E.g., Doering v. State*, 313 Md. 384, 411-12, 545, A.2d 1281, 1295 (1988). In *Doering*, defendant offered a broad-based argument in support of his position, contending that evidence relating to parole is material to the question of the

appropriateness of a life sentence and therefore may operate as a mitigating circumstance. Agreeing with his position, the Maryland court noted that its death penalty statute, like that in North Carolina, is structured to give broad discretion to the sentencing authority, especially with respect to the consideration of mitigating circumstances. "If the sentencing authority perceives anything relating to the defendant or the crime which causes it to believe that death may not be appropriate, it may treat such factor as a mitigating circumstance and decide that it [is not outweighed by] the aggravating circumstances." *Foster v. State*, 304 Md. 439, 475, 499 A.2d 1236, 1254 (1985), *cert. denied*, 478 U.S. 1010 (1986). The appropriateness of sentences other than death may be considered by the sentencing authority as a mitigating circumstance. Given these considerations, the Maryland court concluded "that a jury seeking to determine the appropriateness of a life sentence will be aided by information correctly describing the legal and practical effects of such a sentence, and that the existence of an appropriate alternative sentence must certainly be considered a relevant mitigating circumstance." *Doering*, 313 Md. at 411-12, 545 A.2d at 1295. Defendant was therefore entitled to have the jury consider relevant, competent, and non-misleading information "concerning his eligibility for parole in the event a life sentence is imposed . . . ." *Id.* This analysis is equally applicable to defendant.

The North Carolina capital sentencing scheme accords the jury, as sentencer, broad discretion in determining what is mitigating. The jury is statutorily entitled to consider any circumstance that it deems to be mitigating. N.C. Gen. Stat. §15A-2000(f)(9). Defendant's statutory lack of eligibility for parole until serving at least twenty years of his North Carolina life sentence, which time could only begin to run after the expiration of his Virginia life sentence if imposed consecutively thereto, could be considered mitigating in that it could serve as a basis for a sentence less than death. Thus, the trial court's refusal to allow defense counsel to argue this relevant law to the

jury violated defendant's statutory and constitutional rights. In the same respect that the trial court's unjustifiable restriction on defendant's argument with respect to the law on consecutive sentences, the error in this instance is equally not harmless. For the same reason, then, defendant must receive a new sentencing hearing.

XV. THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO MAKE DEFENDANT'S PURPORTED ABSENCE OF REMORSE AT TRIAL, ARISING SOLELY FROM HIS UNWILLINGNESS TO ADMIT GUILT TO THE JURY AND BASED UPON GROSS MISSTATEMENTS OF THE EVIDENCE, A FACTOR IN THE SENTENCING PROCEEDING.

Assignment of Error No. 43, Rpp. 72-73
Exception No. 136, Tp. 1997

During his closing argument, the prosecutor stressed defendant's purported absence of remorse at trial, long after the crime itself had been perpetrated. The basis underlying this contention was his unwillingness to admit guilt before the jury in the courtroom. That unwillingness was a focal point of the closing argument. (Tpp. 1997) Where defendant's own actions or words outside the courthouse reflect remorselessness, such evidence in some circumstances might be relevant to the issue of the heinousness, atrociousness or cruelty inherent in the killing. *See State v. Gladden,* 315 N.C. 398, 340 S.E.2d 673 (1986); *State v. Pinch,* 306 N.C. 1, 292 S.E.2d 203 (1982). That aggravating factor was neither requested by the state nor submitted by the court. Likewise, if defendant advances remorse in mitigation, he might open the door to rebuttal by the state. *Cf. State v. Brown,* 306 N.C. 151, 293 S.E.2d 569 (1982) (lack of remorse used to rebut non-statutory mitigating factor). Defendant made no such request, evidential presentation, or argument. To exploit at sentencing defendant's failure to express remorse at trial by virtue of his silence or his unwillingness to admit

and be sure that your juror badge is exposed to the public eye at all times during the recess.

Ask that everyone else remain seated as the jurors are being excused.

Jurors are excused for fifteen minutes.

(Whereupon the following took place in the absence of the jury:)

THE COURT: Now, in the absence of the jury, anything before we take our recess?

MR. BREWER: Yes, sir, Your Honor. Your Honor, may I approach?

THE COURT: Yes, sir.

(Side-bar conference was held by the Court, Mr. Brewer, Mr. Currin, Mr. Galloway and Mr. Tolin.)

THE COURT. There is a pending motion which was filed December 11, 1985, by the defense to restrict the District Attorney's argument in connection with general deterrence. The first District Attorney to argue, Mr. Currin, made no argument concerning general deterrence. So the Court will -- the record will reflect the Court's ruling on this motion. The motion is allowed to the following extent. The District Attorney shall not argue at any time before the jury any theory of general deterrence in connection with

the death penalty. The Court also would at this time note for the record that the defense may not argue anything concerning the possibility of parole, the possibility of executive clemency, the possibility of any other governmental agency taking steps in connection with the sentencing proceeding.

MR. BREWER: State would request that the defense be cautioned that the defendant should not argue that the defendant will -- will or may spend the rest of his life in prison providing necessary prevention. The North Carolina Supreme Court says that defense attorneys are cautioned to avoid such remarks at any stage of the proceedings.

MR. GALLOWAY: Does the Court interpret that as meaning in this case that the Court would find it improper to make any reference to the fact that the defendant already has a life sentence facing him?

THE COURT: Mr. Brewer, bring your case into chambers and we'll discuss this for a moment while -- or I will review it in chambers and then we'll go back on the record at the end of the recess.

MR. BREWER: Thank you, Your Honor.

THE COURT: Take a fifteen minute recess.

(Thereupon at 11:05 a.m. the trial

recessed. At 11:20 a.m. the following took place out of the presence of the jury:)

THE COURT: Let the record reflect that the Court has reviewed the case of State versus Boyd, 311 N.C., at Page 425. The Court did this in chambers. The Court has not had the attorneys present while the Court did this.

In connection with the State's request, the Court rules that the defense attorney may not mislead the jury as to the effect of a life sentence. You may argue to the jury that the defendant has received a life sentence in Virginia, but you may not argue as to the effect of a life sentence.

MR. GALLOWAY: I would tender an argument that the -- has the Court finished?

THE COURT: Yes, sir.

MR. GALLOWAY: I would tender an argument to the jury that the Court has it within its potential to impose a consecutive life sentence.

THE COURT: The Court's ruling is that is a matter that is for the Court and not the jury and you may not argue that the Court has the power to give a consecutive life sentence.

MR. GALLOWAY: Thank you. In order that I may preserve that for the record, may I make

that tender to the jury at this time in order not to be objected to during argument and have the objection sustained?

THE COURT: You may state for the record what your argument would be along that line.

MR. GALLOWAY: My argument to the jury would be that the Court has it within its power and discretion to impose a life sentence which would run at the end of the life sentence which the defendant is serving in the State of Virginia.

THE COURT: The Court's ruling is you may not order -- you may not argue that to the jury.

MR. GALLOWAY: Thank you.

THE COURT: Anything further?

MR. TOLIN: Your Honor, if we can show on the record that we would request Issue Four be broken into two different issues, sir. I would note on the record that the written issue sheet was handed to the attorneys just prior to my opening arguments and I had not had an opportunity to read it until after I concluded my opening argument.

THE COURT: Now, just a moment. The fourth issue was straight out of the pattern instructions, is it not?

MR. TOLIN: Yes, sir, it is.

to be on death row? People that kill with a cold and clear mind. People that kill for money. People that continue to go in and knock off ABC stores. Terrorists who kill because a human life is not as important to them as some political ideal. Those are the people that deserve to be on death row. Those are the people that deserve it. Not people like Ricky Price who are sick and I think you will agree that sickness is a major component in what has transpired here. I'm not asking you to forgive him. I'm not asking that for a minute. He's already serving a life sentence. I'm not asking you to forgive a thing. You have already found him guilty, and you know -- you know that you found him guilty.

There is no more final sentence than a sentence of death. You can't do anything more final than that. Each of you has the power if you believe in life to assert your convictions. Never in your life have you had power like you have right now, never in your life.

I hope that you never force a situation in the future that gives you this kind of power because of the awesome responsibility. But you have the power, you have the responsibility.

Ricky's family has suffered. You have

weren't allowed to bring in a lot of her family and a lot of her friends and show you pictures of Brenda Smith while she was alive or to tell you about her background and what type of person she was and what the value to be placed on her life to society was.

Defendant contends that these words rendered his sentence unconstitutionally unreliable in the same way that victim impact statements introduced to the jury during capital sentencing in *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440, were held to be irrelevant to the sentencing decision and their admission to create "a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." *Id.* at 503, 107 S.Ct. at 2533, 96 L.Ed.2d at 448. The United States Supreme Court has come to similar conclusions regarding a prosecutor's remarks characterizing the victim's personal qualities. *South Carolina v. Gathers*, 490 U.S. ——, 109 S.Ct. 2207, 104 L.Ed.2d 876, *reh'g denied*, —— U.S. ——, 110 S.Ct. 24, 106 L.Ed.2d 636 (1989).

Unlike evidence placed before the jury in *Booth* and *Gathers*, however, the personal qualities of the victim and the devastation wrought upon her family by her death simply were not invoked by the prosecutor's words in this case. It is true that the "rights of the victim" and those of her family are not relevant to the proper focus of sentencing arguments upon the character of the criminal or the circumstances of the crime. *See, e.g., State v. Brown*, 320 N.C. at 202-03, 358 S.E.2d at 17. *See also South Carolina v. Gathers*, 490 U.S. at ——, 109 S.Ct. at 2211, 104 L.Ed.2d at 883. But these issues were the subject of mere allusion by the prosecutor; if improper, the error was *de minimis*. It was well within the trial court's discretion not to intervene and recognize the error *ex mero motu*. *Brown*, 320 N.C. at 203, 358 S.E.2d at 18. Nor does the trial court's failure to intervene imply an abrogation of defendant's constitutional rights, for as we have held in *State v. Artis*, such "mere allusion to the loss the victim's family feels does not threaten to sweep juror ruminations into the realm of the arbitrary and capricious." *Artis*, 325 N.C. at 327, 384 S.E.2d at 498. Given the solid evidentiary foundation for the two aggravating circumstances found by the jury, we hold that any arguable error in the trial court's failure to intervene was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988); *Artis*, 325 N.C. at 327, 384 S.E.2d at 498.

[26] The third occasion upon which defendant alleges the trial court erroneously failed to intervene was during the following portion of the prosecutor's argument:

> Jesus says in the Lord's prayer, "Forgive us our trespasses as we forgive those who trespass against us," but you have no right under the law. And you may forgive trespasses in your personal life, you may forgive those trespasses, but you have no right as a sworn juror in the State of North Carolina to forgive the trespasses against the State of North Carolina. That is to have no part in your deliberations. You cannot forgive the defendant for what he did to Brenda Smith. And your verdict, be it life or be it death, should be no reflection on any sympathy or forgiveness or any religious feelings you have about this case.

Defendant rests his argument solely upon the prosecutor's admonition in the last sentence above that jurors must not allow sympathy to inform their recommendation as to defendant's sentence. These words were not the subject of an objection at trial nor were they included amongst defendant's designated exceptions comprising his assignments of error. Despite his failure to object, defendant contends that the trial court's failure to intervene constituted plain error. N.C.R.App.P. 10(c)(4) (1989); *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). This Court may review such alleged errors when their gravity "amounts to a denial of a fundamental right of the accused." *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 103 S.Ct. 381, 74 L.Ed.2d 513 (1982)).

The scope of this Court's review on appeal, however, "is confined to a considera-

assents thereto. The polling being unanimous, the Court orders that the issues and recommendation as to punishment form be recorded by the clerk.

Mr. Sheriff, do you want to impose restraints.

(Whereupon leg irons were placed on the defendant.)

THE COURT: Any further motions?

MR. GALLOWAY: If it please the Court, we would at this time move for appropriate relief to set aside the recommendation as outweighed by the evidence and contrary to the law, due to evidence -- due to errors assigned and to be assigned.

THE COURT: Motion is denied.

MR. GALLOWAY: We would make a motion for appropriate relief for a new hearing on the sentencing issues as contrary to the evidence and contrary to law and with respect to the entire proceedings, the guilt phase as well as the non-guilt phase due to errors assigned and to be assigned.

THE COURT: Motion denied. Motion for new trial denied.

MR. GALLOWAY: No more motions at this time.

THE COURT: All right.

PRESERVATION ISSUES

XXI. THE SENTENCING INSTRUCTIONS LIMITED CONSIDERATION OF MITIGATING FACTORS, FOR THE PURPOSE OF THE ULTIMATE SENTENCING DECISION, BY AN INDIVIDUAL JUROR ONLY TO MITIGATING FACTORS UNANIMOUSLY FOUND BY THE JURY AS A WHOLE IN VIOLATION OF LOCKETT V. OHIO, AS CONSTRUED IN MILLS V. MARYLAND.

Assignment of Error No. 48, Rp. 74
Exception No. 152,
Exception No. 155,
Exception No. 156,
Exception No. 157,
Exception No. 158,
Exception No. 159,
Exception No. 160,
Exception No. 161,
Exception No. 162,
Exception No. 163,
Exception No. 164,
Exception No. 166A,
Exception No. 172A,
Assignment of Error No. 49, Rp. 74
Exception No. 166A, Tp. 2066

During the penalty phase of defendant's case, he offered evidence of various specific mitigating factors. The jury as a group found only one of the nine specific mitigating factors submitted. (Rpp. 11-12) When the jurors reached Issue Three and Issue Four and were required to balance mitigation with aggravation, however, each juror was only allowed to consider, in his or her ultimate sentencing decision, mitigation actually found unanimously by the jury. The trial court denied defendant's requested instruction that the jury had to be unanimous to reject a mitigating factor. (Tp. 2065) The prosecutor exploited the unanimity requirement in his closing argument. (Tp. 2005) The eighth amendment will not tolerate a capital sentencing procedure that risks

erroneous imposition of a death sentence by chancing the sentencer's failure to consider all the mitigating evidence. *E.g., Mills v. Maryland*, ___ U.S. ___, 100 L.Ed.2d 384 (1988). Because defendant's sentence of death was imposed in a constitutionally defective manner, it cannot stand.

Defendant recognizes this Court rejected this argument in *State v. McKoy*, 323 N.C. 1, 372 S.E.2d 12 (1988), *cert. granted*, ___ U.S. ___ (1989). Defendant respectfully requests this Court to reexamine this decision in light of the remand for further consideration by the United States Supreme Court in *Lloyd v. North Carolina*, No. 87-6833 (order of 10 October 1988) and the granting of review in *McKoy* and adopt the rationale of Chief Justice Exum's reasoned dissent in *McKoy*.

XXII. THE NORTH CAROLINA DEATH PENALTY STATUTE, SECTION 15A-2000, AND CONSEQUENTLY THE DEATH SENTENCE IN THIS CASE, IS UNCONSTITUTIONAL, IS IMPOSED IN A DISCRIMINATORY MANNER, IS VAGUE AND OVERBROAD, AND INVOLVES SUBJECTIVE DISCRETION, ALL IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 19 AND 27 OF THE NORTH CAROLINA CONSTITUTION.

Assignment of Error No. 31, Rp. 70
Exception No. 3, Tp. 43
Assignment of Error No. 55, Rp. 75
Exception No. 181, Rp. 13
Exception No. 182, Rp. 13
Exception No. 184, Rp. 16

Defendant contends that the North Carolina death penalty statute is unconstitutional and is applied arbitrarily, capriciously, and whimsically and pursuant to a pattern of practice of discrimination on grounds of race, sex, and poverty. It is

No. 585 A 87 NINTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA
v.
RICKY LEE PRICE

From Person

DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF

FILED
OCT 5 11 45 AM '90

ARGUMENT

I. THE STATE CANNOT ESTABLISH BEYOND A REASONABLE DOUBT THAT THE UNCONSTITUTIONAL UNANIMITY REQUIREMENT DID NOT PRECLUDE A JUROR'S CONSIDERATION OF MITIGATING EVIDENCE.

Initially, constitutional error clearly occurred in this case because the jury was instructed that it could only consider mitigating circumstances found unanimously by it. *See McKoy v. North Carolina*, 494 U.S. ___, 108 L.Ed.2d 369 (1990). Both the jury instructions and the sentencing recommendation form in this case expressly required jury unanimity to find a mitigating factor. (Tpp. 2043, 2046, 2047-48, 2049, 2050, 2051, 2052-53, 2054, 2055, 2056-57, Rp. 11) Given the existence of this error, the only remaining issue is whether the state can show the error was harmless beyond a reasonable doubt.

Under the facts and circumstances of this case, the state cannot sustain its heavy burden. *See generally State v. Wilson*, 322 N.C. 117, 145, 367 S.E.2d 605, 606 (1988) (describing virtual impossibility of finding harmless an erroneous failure to submit a mitigating factor for the jury to consider given the "nuances of character and circumstance" involved in a capital sentencing hearing). This Court has acknowledged "the constitutional importance of preserving the jury's ability to consider under proper instructions all evidence proffered by a capital defendant that could reasonably mitigate this sentence to something less than death . . . ." *State v. McKoy*, 327 N.C. 31, 44, 394 S.E.2d 426, 433 (1990). Accordingly, "it would be a rare case in which a *McKoy* error could be deemed harmless." *Id.* The present case is far from such "a rare case."

A. Plenary Evidence Supported Each Unfound Mitigating Factor.

At Issue Two in the proceedings below, the sentencing jury considered but failed to find unanimously the following mitigating circumstances:

> -- This murder was committed while the defendant was under the influence of mental illness or emotional disturbance.
>
> -- The capacity of the defendant to conform his conduct to the requirements of the law was impaired by low intelligence.
>
> -- The capacity of the defendant to conform his conduct to the requirements of the law was impaired by manic depressive illness.
>
> -- The capacity of the defendant to conform his conduct to the requirements of the law was impaired by schizophrenic illness.
>
> -- The capacity of the defendant to conform his conduct to the requirements of the law was impaired by emotional instability.
>
> -- The capacity of the defendant to conform his conduct to the requirements of the law was impaired by drug abuse.
>
> -- The capacity of the defendant to conform his conduct to the requirements of the law was impaired by drug-induced mental illness.
>
> -- The capacity of the defendant to conform his conduct to the requirements of the law was impaired by mixed personality disorder.
>
> -- Any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value.

(Rpp. 11-12) The jury answered "No" to each of these nine mitigating circumstances after being instructed to so answer each circumstance if the jury did not unanimously find it. (Tpp. 2046, 2047-48, 2049, 2050, 2051, 2052-53, 2054, 2055, 2056-57)

As noted previously, this case is certainly not the rare case in which *McKoy* error can be deemed harmless since, given its federal constitutional dimension, the state must demonstrate its harmlessness beyond a reasonable doubt. N.C. Gen. Stat. § 15A-

1443(b). This Court opined in *McKoy* that a case in which *McKoy* error might be harmless was one "in which there was little or no mitigating evidence proffered, or in which the jury found the existence of all proposed mitigating circumstances but none the less imposed the death penalty . . . ." 327 N.C. at 44 n.4, 394 S.E.2d at 433 n.4. To the contrary, substantial mitigating evidence was presented below. Numerous witnesses -- including three expert psychiatrists, several lay witnesses, and defendant -- testified with respect to mitigation. Obviously, given the jury's rejection, pursuant to the unconstitutional unanimity requirement, of eight specified, statutory mitigating circumstances and the residual provision, defendant's case is not the rare one hypothesized in *McKoy*.

This Court has yet to find *McKoy* error harmless in any case where some evidence supported a mitigating circumstance that the jury failed to find unanimously. *See, e.g., State v. McNeil*, 327 N.C. 388, 395 S.E.2d 106 (1990); *State v. Sanders*, 327 N.C. 319, 395 S.E.2d 412 (1990); *State v. Sanderson*, 327 N.C. 397, 394 S.E.2d 803 (1990); *State v. Robinson*, 327 N.C. 346, 395 S.E.2d 402 (1990); *State v. McKoy*, 327 N.C. 31, 394 S.E.2d 426 (1990); *State v. Brown*, 327 N.C. 1, 394 S.E.2d 434 (1990). The inquiry for this Court is simple: if evidence existed which would have reasonably permitted one or more jurors to find and consider a mitigating circumstance not unanimously found and thus not considered by any juror in the final balancing process, then the *McKoy* error is not harmless. *Sanders*, 327 N.C. at 344, 395 S.E.2d at 428-29.

Considerable evidence supported the mitigating circumstance that the murder was committed while defendant was under the influence of mental illness or emotional disturbance.[1] Substantial evidence existed of defendant's long history of mental

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[1] This circumstance has mitigating value as a matter of law since it is a statutory mitigating circumstance. N.C. Gen. Stat. § 15A-2000(f)(2); *see State v. Pinch*, 306 N.C. 1, 27, 292 S.E.2d 203, 224, *cert.*

illnesses and emotional disturbances. Dr. Arthur Centor, a forensic psychologist, examined defendant in 1984 and, in the course of rendering an opinion and evaluation of his mental condition, relied upon records of various mental institutions where defendant had been previously housed, examined, and treated. (Tpp. 1694-99) Dr. Centor admitted that "an individual may be mentally ill, but not have a defective reason about [a] particular act." (Tp. 1703) Defendant had been hospitalized at Southwestern State Hospital from 12 January 1978 to 1 June 1978. He suffered from a serious, manic-depressive illness. The psychiatric reports showed defendant suffered "evidence of severe thought disturbance and that some of his utterances were apparently delusional, that is, having a false belief, and that his affect or emotions . . . . appeared to be manic in character, manic meaning elated, up as opposed to depressed." (Tpp. 1711-12) Treating doctors prescribed lithium for the manic-depressive illness and mellaril, a psychotropic drug, for the delusional thinking. (Tp. 1714)

The examination and treatment at Southwestern in 1978 was not defendant's first psychiatric hospitalization. His mother, Cleo Price, recounted that he had been housed and treated at Dorothea Dix Hospital for six to eight weeks when he was thirteen or fourteen. (Tp. 1578) He was later transferred to Butner for seven or eight additional months. (Tp. 1579) He was hospitalized at Butner three additional times before he reached the age of eighteen. (Tp. 1581)

Dr. Centor also reviewed records from John Umstead Hospital. (Tp. 1719) During an admission to that institution in 1974, doctors diagnosed defendant as a paranoid schizophrenic. (Tp. 1720) He was subsequently admitted a year later and the same diagnosis was reached. (Tp. 1722) Dr. Centor explained that "schizophrenia is a condition which is not organic. It comes from the life of the individual, the stresses,

denied, 459 U.S. 1056 (1982), *overruled in part on other grounds, State v. Wilson*, 322 N.C. 117, 367 S.E.2d 589 (1988).

strains of living, the inability almost to cope with life, to deal with life." (Tp. 1724) The continual use of narcotics can cause the development of a mental disorder. During defendant's 1975 institutionalization, physicians continued him on psychotropic medication. (Tpp. 1727-28)

Defendant was admitted to John Umstead in 1977 for the fifth time. This involuntary commitment resulted from "a history of recurring psychotic behavior [where defendant] was overactive, agitated, hostile, threatening, and had been in several fights resulting in bodily injuries to others." (Tp. 1729) Psychotic behavior, according to Dr. Centor, is "the extreme form of mental illness which is more than neurosis and neurotic." (Tp. 1730)

Dr. Brad Fisher, a clinical forensic psychologist, evaluated defendant based upon personal interviews with him, as well as reviews of forensic evaluations and other materials concerning defendant. (Tpp. 1870-75) Dr. Fisher opined that defendant suffered from a major mental illness. (Tp. 1877) He found a strong indication of the seriousness of defendant's mental condition based upon the level and consistency of the psychotropic medication he had received for many, many years. (Tp. 1881) He concluded that defendant suffered from a serious mental illness in October 1984 that would have impaired his ability to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law. (Tpp. 1883-84) Defendant had "a very impaired control system" because of his mental illness. (Tp. 1808)

Plenary evidence existed in the record from which a reasonable juror could have found that Brenda Smith was killed while defendant was under the influence of a mental illness or emotional disturbance. In a highly similar situation, a defendant's use of drugs on the day he committed a murder constituted sufficient evidence "from which at least some jurors might have found the existence of this circumstance." *Sanderson*,

327 N.C. at 402, 394 S.E.2d at 806. A reasonable juror certainly could have found this statutory mitigating circumstance from the evidence in this case absent the unconstitutional unanimity requirement. Accordingly, the constitutional error in this case cannot be deemed harmless beyond a reasonable doubt.

Substantial evidence also existed to support the second mitigating factor submitted: that defendant's capacity to conform his conduct to the requirements of the law was impaired by low intelligence.[2] Dr. Centor administered a battery of intelligence and psychological tests to defendant, including the Wechsler Adult Intelligence Scale - Revised, the Bender Gestalt Test, and the Rorschach Test. (Tpp. 1732-37) On the intelligence test, defendant functioned at the borderline level of intelligence between mental retardation and average intelligence. (Tpp. 1717-18) Dr. Centor felt defendant was "closer to mental retardation." (Tp. 1718) Defendant had an IQ between 70 and 79, essentially borderline mental retardation. (Tp. 1748) Dr. Selwyn Rose, a forensic psychiatrist, felt a primary explanation of defendant's mental disorder was his mental retardation. (Tp. 1814) Based upon this substantial evidence, it is impossible to say beyond a reasonable doubt that at least one juror could not have found this statutory mitigating circumstance.

Likewise, the jury heard considerable evidence regarding the statutory mitigating circumstance that defendant's capacity to conform his conduct to the requirements of the law was impaired by manic-depressive illness. As noted previously, Dr. Centor reviewed and testified concerning medical records from various institutions which provided psychiatric treatment to defendant. Doctors at Southwestern State Hospital in 1978 diagnosed him as having a manic-depressive illness. Dr. Centor described this

[2] This circumstance is also mitigating as a matter of law since it is statutory. *See* N.C. Gen. Stat. § 15-2000(f)(6). Each of the unfound mitigating factors, save the catch-all provision, are couched in statutory terms and, hence, have mitigating value as a matter of law.

illness as serious. (Tp. 1706) Doctors prescribed lithium for defendant's manic-depressive condition. (Tp. 1714) Defendant testified regarding his hospitalization at Dorothea Dix, where he was placed in a management ward and strapped to a bed. (Tp. 1612) Sufficient evidence existed from which a reasonable juror could have found this statutory, diminished capacity circumstance.

Additionally, evidence existed to support the fourth mitigating circumstance that defendant's capacity to conform his conduct to the requirements of the law was impaired by a schizophrenic illness. Records from defendant's hospitalization at John Umstead in 1974 revealed a diagnosis of paranoid schizophrenia. (Tpp. 1719-20) This diagnosis involved defendant having a thought disorder of a type that contained delusions and paranoia, thoughts that "people were against him or trying to hurt him or something of that type. Paranoia being abnormal thinking." (Tp. 1721) At a subsequent hospitalization in 1975, the same diagnosis obtained. (Tp. 1722) As Dr. Centor explained, the continual use of drugs can cause the development of a mental disorder such as schizophrenia. One could even have a major episode involving a mental disorder from ingesting just a moderate amount of drugs, especially acid or LSD. (Tp. 1726) Various witnesses testified that defendant frequently used drugs including acid, microdot, and LSD. (Tpp. 1629, 1665-68, 1683) Defendant admitted becoming involved with narcotics when he reached the seventh grade and began "hanging around with [people who] smoked dope and different things." (Tp. 1609) His final hospitalization in a psychiatric institution was caused by using acid or LSD. (Tp. 1620) He admitted using drugs during the period of time when Brenda Smith and Joan Brady died. (Tp. 1629) Quite plainly, a reasonable juror could have found this statutory mitigating circumstance based upon the evidence introduced at the proceedings below.

As a fifth mitigating circumstance, the jury considered whether defendant's capacity to conform his conduct to the requirements of the law was impaired by emotional instability. An inmate who had been incarcerated with defendant in the Danville County Jail stated that defendant admitted killing Brenda Smith and Joan Brady. (Tpp. 1262-65) According to this inmate, defendant felt he had been dating too many people. Things had begun building up on him. He felt he had to eliminate somebody. (Tp. 1268) Defendant was suffering from too much pressure from his involvement with various women. (Tp. 1269) This evidence demonstrated an emotional instability that would have impaired defendant's capacity to conform his conduct to the requirements of the law. Dr. Rose concluded that defendant suffered from "personality disturbances which [where] quite profound." These resulted in his poor impulse control. (Tpp. 1800-01) A juror could have found this factor.

Additionally, abundant evidence existed of defendant's impaired capacity due to his drug abuse, the sixth mitigating factor submitted. Defendant had used drugs since the age of twelve. He smoked marijuana and took acid frequently. He also used synthetic morphine and tried cocaine. (Tpp. 1742-43) Defendant admitted using drugs at the time Brenda Smith was killed. (Tpp. 1229-31) Witnesses who saw defendant during this period time also felt he was under the influence of narcotics. (Tpp. 1676-83, 1854-55) Dr. Rose testified that defendant's condition was impaired in October 1984, in large part, because of his drug abuse. (Tp. 1805) This drug abuse, combined with his mental illness and limited intellectual capacity, completely distorted his thinking. They combined to impair his ability to make judgments, and rational decisions, as well as control his impulses. (Tpp. 1806-07) Defendant suffered from a very impaired control system due to his mental illness and drug abuse. (Tp. 1808) As Dr. Centor had explained, defendant's continual use of drugs could cause a mental disorder. He could have had a major episode involving a mental disorder from ingesting just a moderate

amount of drugs, especially acid or LSD. (Tp. 1726) Given the evidence of defendant's use of drugs around the time Brenda Smith was killed and the expert testimony regarding its effect upon his mental condition, this Court cannot say beyond a reasonable doubt that a rational juror could not have found this statutory mitigating circumstance.

Similarly, this evidence also supported[3] the seventh mitigating circumstance: defendant's capacity to conform his conduct to the requirements of the law was impaired by drug-induced mental illness. Dr. Centor's testimony established how drug use, like that done by defendant, can cause the development of a mental disorder and the explosion of a major episode. Dr. Rose confirmed defendant's drug abuse would completely distort his thinking and impair his ability to make judgments and rational decisions. (Tpp. 1805-07) His capacity to conform his conduct to the requirements of the law would have been impaired by the mental illnesses associated with the drug abuse. (Tp. 1808) Janice Bates, who had lived with defendant until September 1984, noted that he took drugs during this period of time. (Tpp. 1853-54) She saw defendant shortly before the killing and noticed that he was acting very differently from when he was merely drinking. (Tpp. 1854-55) This Court cannot confidently say that, absent the unconstitutional unanimity requirement, a reasonable juror would not have found this mitigating factor.

Additionally, evidence supported the statutory mitigating factor that defendant's capacity to conform his conduct to the requirements of the law was impaired by a mixed personality disorder. Dr. Rose interviewed defendant and requested psychological testing of him. Relying upon this information, as well as the reports of seven other doctors in discharge summaries from various mental institutions, he concluded

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[3] The same evidence may, of course, support multiple, independent mitigating factors. *Sanders*, 327 N.C. at 344, 395 S.E.2d at 429.

defendant had an enormous history of mental illness. (Tpp. 1791-97) Every doctor who had treated defendant used anti-psychotic, "heavy-duty medications." Dr. Rose felt defendant suffered from "personality disturbances which [were] quite profound." Defendant's symptoms could be explained with a diagnosis of "mixed personality disorder plus alcohol and substance abuse." (Tpp. 1812-13) Defendant had a long-standing adjustment problem explained in part by an intermittent affective disorder and alcohol and substance abuse. (Tpp. 1812-13) A reasonable juror could have found this mitigating circumstance based upon the evidence introduced in the sentencing proceeding.

Aside from these statutory, specified mitigating circumstances, evidence also existed from which a reasonable juror could have found a number of unspecified mitigating circumstances. *See* N.C. Gen. Stat. § 15A-2000(f)(9). First, the jury heard, based upon evidence introduced by the prosecution, defendant received a life sentence in Virginia for the killing of Joan Brady. (Tpp. 1563-66) A rational juror could have found this lengthy sentence to be a reason for returning a sentence less than death. As a matter of record, defendant requested the trial court to submit this life sentence as a nonstatutory mitigating circumstance. Based upon the state's objections, however, the trial court declined to submit this factor to the jury.[4] (Tpp. 1930-32)

Likewise, evidence also established defendant had received a fifty-year sentence of imprisonment for the incident at the James Hardy residence. (Tp. 1632) Defendant's jury heard considerable testimony regarding the incident at the Hardy residence during the trial. This evidence included several violent acts by defendant

[4] The trial court independently erred in failing to submit several requested nonstatutory mitigating factors supported by the evidence. *State v. Benson*, 323 N.C. 318, 325-27, 372 S.E.2d 517, 521-22 (1988); *see also State v. Cummings*, 326 N.C 298, 389 S.E.2d 66 (1990) (error in failing to list in writing requested nonstatutory mitigating factors on the issue and recommendation form). This error entitles defendant to a new sentencing hearing irrespective of the resolution of the harmless error analysis of the *McKoy* issue.

toward various individuals. (Tpp. 1201-04) Using both a knife and a gun, defendant threatened to kill several people. (Tpp. 1206-14) Police officers testified that defendant kept them at bay during this incident for approximately five and one-half hours before he was subdued and arrested. (Tpp. 1219, 1239-40) During this incident, defendant also made various incriminating statements. (Tpp. 1204-06, 1222) A rational juror might have found this fifty-year sentence that defendant was already serving constituted a basis for a sentence less than death and therefore, would have been mitigating.

Additionally, the jury might have concluded that defendant suffered from a mental illness that impaired his ability to appreciate the criminality of his conduct. Dr. Fisher explained defendant suffered from a major mental illness. (Tp. 1877) He based this conclusion on his interviews with defendant, reviews of forensic and mental health evaluations, and the level and consistency of medication by psychotropic drugs in defendant's medical history. (Tpp. 1874-75, 1881) Furthermore, Dr. Fisher considered the history of mental illness in defendant's family. (Tp. 1882) In his opinion, defendant suffered from a serious mental illness in October 1984 that would have impaired his ability to appreciate the criminality of his conduct. (Tpp. 1883-84) As a practical matter, evidence that defendant suffered from any condition that impaired his ability to appreciate the criminality of his conduct is mitigating as a matter of law. *See* N.C. Gen. Stat. § 15-2000(f)(6). At no time, however, did the trial court instruct the jury regarding the mitigating nature of defendant suffering from an impairment to his ability to appreciate the criminality of his conduct.[5] Based upon the evidence below, a reasonable juror could have found that defendant suffered from a mental illness which

[5] The trial court should have instructed the jury on this statutory mitigating factor, even absent defendant's request or over his objection. *State v. Lloyd*, 321 N.C. 301, 311-13, 364 S.E.2d 316, 323-24 (1988), *vacated and remanded on other grounds*, 108 L.Ed.2d 601 (1990). This error entitles defendant to a new sentencing hearing irrespective of the prejudice from the *McKoy* error.

impaired his ability to appreciate the criminality of his conduct.[6] Given the substantiality of the evidence supporting this circumstance, the *McKoy* error cannot be deemed harmless.

Defendant was only twenty-six at the time Brenda Smith was killed. (Rpp. 2-3) Defendant's age at the time of the crime is a statutory mitigating circumstance. *See* N.C. Gen. Stat. § 15-2000(f)(7). Defendant's chronological age is not the determinative factor for finding this mitigating circumstance. *State v. Oliver*, 309 N.C. 326, 372, 307 S.E.2d 304, 333 (1983). A person's youth is relative requiring the jury to weigh this factor in light of varying conditions and circumstances. *State v. Johnson*, 317 N.C. 343, 393, 346 S.E.2d 596, 624 (1986); *Giles v. State*, 261 Ark. 413, 421, 549 S.W.2d 479, 483, *cert. denied*, 434 U.S. 894 (1977). Indeed, the Supreme Court of the United States noted that a defendant's age of twenty could constitute a mitigating factor to a capital jury. *Mills v. Maryland*, 486 U.S. 367, 380 n.14 (1988). The jury might have determined, based upon evidence of defendant's impaired mental capacity, his severe emotional disturbances, his low intellectual capacity, his mental retardation, and his history of institutionalization in psychiatric hospitals, combined to make his age a mitigating circumstance. The jury also had an opportunity to assess his demeanor and condition, both mental and emotional, at trial. "[E]vidence is not only what [jurors] hear on the stand but [is also] what they witness in the courtroom." *State v. Brown*, 320 N.C. 179, 199, 358 S.E.2d 1, 15, *cert. denied*, 484 U.S. 970 (1987). Given the evidence presented at trial regarding defendant's age, educational background, psychiatric history, drug-induced condition, mental retardation, limited intellectual capacity, and this Court's

[6] Even with the trial court's submission of defendant's inability to conform his conduct to the requirements of the law due to his mental illness, it also was necessary to submit defendant's impaired capacity to appreciate the criminality of his conduct due to his mental illness. The two parts of this statutory provision encompass separate facets of defendant's mental condition. The submission of only one part constitutes reversible error. *State v. Bacon*, 326 N.C. 404, 417-20, 390 S.E.2d 327, 334-36 (1990). This error provides an independent basis upon which to award defendant a new sentencing hearing.

inability to assess the defendant's demeanor [and other personal characteristics] from the written record," *McNeil*, 327 N.C. at 396, 395 S.E.2d at 111, it is impossible to say beyond a reasonable doubt that at least one juror could not have found this statutory mitigating circumstance. A juror could certainly have found it within the context of the catch-all provision.

Finally, defendant had worked at various jobs. His mother testified that he usually held more than one job at a time. (Tp. 1586) A reasonable juror could have found his steady, consistent employment to be a nonstatutory mitigating circumstance. This Court recently found evidence of a defendant's employment for a business constituted a possible nonstatutory mitigating circumstance. Given evidence supporting it, the Court was "unable to say beyond a reasonable doubt that no juror could reasonably have found this circumstance to exist and to be mitigating." *Id.* at 395-96, 395 S.E.2d at 111. Since a reasonable juror could have found this nonstatutory mitigating circumstance, the *McKoy* error cannot be deemed harmless.

Substantial evidence existed to support both the eight specified, statutory mitigating circumstances submitted and not found as well as various nonstatutory mitigating circumstances under the catch-all provision. This Court cannot confidently conclude "that no juror might find the mitigating circumstances, however weak, both to *exist* and to have *some* mitigating value." *Id.* at 396, 395 S.E.2d at 111. Certainly, "one or more jurors might have found and considered these additional mitigating circumstances and reached a different conclusion as to sentence." *Sanders*, 327 N.C. at 344-45, 395 S.E.2d at 428. Quite plainly, this case is not the "rare case in which a *McKoy* error [can] be deemed harmless." *McKoy*, 327 N.C. at 44, 394 S.E.2d at 433. Defendant must receive a new sentencing hearing.

B. The Polling Of The Jury Does Not Render The McKoy Error Harmless.

After its lengthy deliberations, the jury returned to the courtroom and announced it had reached a unanimous recommendation as to sentence. After the trial court determined the jury had recommended a sentence of death, the trial court directed the clerk to poll the jury individually.[7] (Tp. 2089) Upon defendant's request, the polling process involved an inquiry as to each aggravating and mitigating circumstance. (Tp. 2091) Despite the state's earlier claim that this polling established the nonprejudicial nature of the unconstitutional unanimity requirement, this Court did not rely upon this position in the previous appeal. *Price*, 326 N.C. at 93, 388 S.E.2d at 105; *but see id.* at 100, 388 S.E.2d at 109-10 (Frye, J., concurring). Likewise, the state urged the Supreme Court of the United States to deny certiorari because of the polling process, yet the court declined to do so.[8] And, contrary to the state's earlier claims, the poll does not conclusively show each juror personally rejected the unfound mitigating circumstances. The state cannot satisfy its burden, even with the jury poll, that the erroneous instructions "did not preclude at least one juror from considering one or more of these mitigating circumstances not unanimously found when weighing all the circumstances in the ultimate sentencing decision." *State v. Robinson*, 327 N.C. 346, 364, 395 S.E.2d 402, 412 (1990).

Analyzing the inadequacy of the jury poll to dispel the *McKoy* error begins with the trial court's charge to the jury. When he explained the second issue in the case, he told the jury:

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[7] In a capital case, the jury must be individually polled to establish each juror's agreement with the sentencing recommendation. N.C. Gen. Stat. § 15A-2000(b).

[8] The court unanimously issued a writ and remanded this case. *Price v. North Carolina*, 48 Crim. L. Rptr. 3016 (1990). Curiously, no justice dissented or expressed concern over this remand in stark contrast with the fierce disagreement in a similarly situated case. *See McNeil v. North Carolina*, 108 L.Ed.2d 756 (1990) (Kennedy, J., dissenting and expressing the views of three other justices).

> Issue Two is "Do you unanimously find from the evidence the existence of one or more of the following mitigating circumstances?"

(Tp. 2043) He then proceeded to instruct the jury as to each of the ten mitigating factors, including the nine specific mitigating factors and the catch-all provision. At the conclusion of his instructions on each mitigating circumstance, he told the jury:

> If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, you will so indicate by having your foreman write no in that space.

(Tpp. 2046, 2047-48, 2049, 2050, 2051, 2052-53, 2054, 2055, 2056) These instructions plainly conveyed to the jury that the answer to each, individual mitigating circumstance must be "No" if there was a lack of unanimity with respect to the particular circumstance. In other words, unless all twelve jurors agreed that a particular mitigating circumstance existed, the answer would be "No."

Immediately upon the jury's announcement that it had arrived at a sentencing recommendation, the trial court instructed the clerk to take the recommendation, which occurred as follows:

> THE CLERK: Ladies and gentlemen of the jury, have you agreed upon your recommendation? The recommendation that shows that:
>
> "Issue One: Do you unanimously find from the evidence beyond a reasonable doubt the existence of one or more of the following aggravating circumstances? Answer: Yes."
>
> As to the aggravating circumstances, "Number 1: Had the defendant been previously convicted of a felony involving the use of violence to the person; to-wit: the conviction of murder arising

out of the death of Joan Brady which occurred October 18, 1984? Answer: Yes."

"(2) Was this murder part of a course of conduct in which the defendant engaged and did that course of conduct include the commission by the defendant of other crimes of violence against Elaine Clay, Robbie Davis, James Hardy and Tony Gammon? Answer: Yes."

"Issue Two: Do you unanimously find that the evidence of the existence of one or more of the following mitigating circumstances? Answer: Yes."

As to the mitigating circumstances, "Number 1: This murder was committed while the defendant was under the influence of mental illness or emotional disturbance. Answer: No."

"(2) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by low intelligence: Answer: No."

"(3) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by manic-depressive illness. Answer: No."

"(4) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by schizophrenic illness. Answer: No."

"(5) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by emotional instability. Answer: No."

"(6) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by drug use. Answer: No."

"(7) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by drug-induced mental illness. Answer: No."

"(8) The capacity of the defendant to conform his conduct to the requirements of the law was impaired by mixed personality disorder. Answer: No."

"(9) The defendant's family has a history of mental illness or emotional disturbance. Answer: Yes."

"(10) Any other circumstance or circumstances arising from the evidence which you, the jury, deem to have mitigating value. Answer: No."

"Issue Three: Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by you, is or are, insufficient to outweigh the aggravating circumstance or circumstances found by you? Answer Yes."

"Issue Four: Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by you? Answer: Yes."

The recommendation is "we, the jury, unanimously recommend that the defendant, Ricky Lee Price, be sentenced to death."

This is your recommendation, so say you all?

THE COURT: If this is your recommendation, so say you all, raise your right hand.

Let the record reflect that each and every juror has raised his or her right hand.

(Tpp. 2086-89) As the record reflects, all twelve jurors raised their hands indicating assent to all of the answers on the Issues and Recommendation form, including the negative answers to nine of the ten mitigating circumstances. At this juncture, the trial court directed that the jury be polled individually. (Tp. 2089) The clerk proceeded to conduct this poll by reading each finding with the jury's answer and then seeking each individual juror's assent. (Tpp. 2091-2153) For example, the clerk addressed the first juror as follows with respect to the first mitigating circumstance:

As to the mitigating factors, "Number 1: This murder was committed while the defendant was under the influence of mental illness or emotional disturbance. Answer: No." Is that your answer?

(Tp. 2093) When the juror responded affirmatively, the clerk then asked him "do you still assent thereto?"

A reasonable likelihood arose from these instructions that an individual would understand that her answer to a specific mitigating circumstance must be "No" unless the entire jury agreed that this mitigating circumstance was proved by a preponderance of the evidence. *See Boyde v. California*, 494 U.S. ___, 108 L.Ed.2d 316 (1990). In the context of the entire charge, a reasonable juror would be hard pressed to understand the challenged instructions to mean that a negative finding of a particular mitigating factor would not be *her* answer if the jury could not unanimously agree that the mitigating factor existed. "Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the way lawyers might. [A] common sense

understanding of the instructions in light of all that has taken place at the trial is likely to prevail over technical hairsplitting." *Id.* at 329. This understanding is particularly appropriate in this case where an individual juror was responding to a question without opportunity for deliberation or discussion with respect to its meaning.

The trial court instructed the sentencing jury on at least ten occasions that it *must* answer "No" to a mitigating circumstance if the jury did not agree unanimously as to its existence. There was no suggestion that each juror could have a different ultimate answer to a particular mitigating circumstance. There could be only one answer for the entire jury. A reasonable juror would have understood this instruction to mean that the jury's negative answer and, hence, her negative answer to any particular circumstance depended on the absence of a unanimous agreement that the circumstance had been proved by a preponderance of the evidence. If a juror so understood the instructions, then *her* answer to a mitigating circumstance would be "No" if the jury failed to agree unanimously as to the existence of this circumstance. Under these conditions, an individual juror's assent to the "No" answer during the poll would simply indicate her agreement that the jury failed to find this circumstance unanimously, not that *she* would have failed to find it she were free to make her own individual determination.

Quite simply, a reasonable juror would have understood the poll to query whether the answers on the issue sheet were the jury's answers. The question asked if a particular answer was "your answer." At each point in the trial when the judge used the word "you" or "your," he referred to the entire jury not to individual jurors. The jury was impaneled with this pronoun collectively; the trial court addressed the jury collectively with this pronoun; and he used the pronoun collectively to frame all of the sentencing issues. Each juror would have understood this question to address whether the answer

to a given mitigating factor was *the jury's* answer. An individual's assent to any answer on the issue sheet means no more than she agrees that the answer was that of the jury.

Each juror would have understood the instructions to mean that the only answer to a mitigating factor was "No" if the jury failed to find it unanimously. When that juror then responded affirmatively to the above polling inquiry, she may reasonably be saying: "Yes. The jury has failed to agree unanimously as to the existence of this mitigating factor." Under such an interpretation, the polling process does not prove the absence of *McKoy* error or that any such error is harmless. Contrary to the state's position, the present record does not conclusively show that each of defendant's jurors rejected the nine unfound mitigating factors.

This Court has recognized that the inquiry is "whether there is a 'reasonable likelihood' that the jury here believed it was required to apply 'the challenge instruction in a way that prevents the consideration of constitutionally relevant evidence.'" *McNeil*, 327 N.C. at 392, 395 S.E.2d at 109 (relying upon the *Boyde* standard). "[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973). The polling process below, therefore, cannot be examined in isolation, but in view of the overall charge. In light of everything defendant's jury heard, a reasonable juror could well have understood the polling inquiry to be whether her answer was "No" because the jury was not unanimous as to the existence of a particular mitigating circumstance.[9]

The jury poll in this case simply does not satisfy the state's burden of demonstrating that the *McKoy* error was harmless beyond a reasonable doubt. "[W]hen

[9] Although this Court has said a *McKoy* error might be deemed harmless in certain circumstances, it did not include a case in which the jury was polled individually as to each mitigating circumstance as "a candidate for successful argument that a *McKoy* error was harmless . . . ." *State v. McKoy*, 327 N.C. 31, 44 n.4, 394 S.E.2d 426, 433 n.4 (1990).

viewed in the context of the overall charge, there is a reasonable likelihood that the jury interpreted the instructions here" in a manner that prevented an individual juror "from considering constitutionally relevant evidence." *McNeil*, 327 N.C. at 392, 395 S.E.2d at 109. Since the state cannot satisfy its heavy burden, defendant must receive a new sentencing hearing.

CONCLUSION

For the reasons stated herein, defendant respectfully requests that this matter be remanded for a new sentencing hearing.

This the 5th day of November, 1990.

Respectfully submitted,

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Assistant Appellate Defender

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ATTORNEYS FOR DEFENDANT

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allowed to ask other questions which should have enabled him to determine if challenges should have been made on this ground. The court instructed the potential jurors as to the method of finding aggravating and mitigating circumstances and the consequences of doing so. The defendant was then allowed to question the jurors as to their ability to follow the court's instruction in regard to these circumstances and apply the law according to the instructions. This should have enabled the defendant to determine whether to challenge a juror on the ground he would automatically vote for the death penalty if the defendant was found guilty.

If the refusal to allow the excluded questions was error, it was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988). The case is remanded to the Superior Court, Person County, for further proceedings.

DEATH SENTENCE AFFIRMED; MANDATE REINSTATED; CASE REMANDED.

STATE of North Carolina

v.

Robert Archie CLEMMONS, Jr.

No. 9218SC78.

Court of Appeals of North Carolina.

Aug. 17, 1993.

Defendant was convicted in the Superior Court, Guilford County, W. Russell Duke, Jr., J., of obtaining property by false pretenses and transacting business in securities without being licensed or registered in violation of North Carolina Securities Act. Defendant appealed. The Court of Appeals, Eagles, J., held that: (1) defendant did not "transact business" within meaning of Securities Act, and (2) court was not required to instruct jury on specific misrepresentation as alleged in indictment.

Reversed and remanded in part, affirmed in part, vacated in part.

1. Securities Regulation ⇐192

Defendant did not "transact business," for purposes of section of Securities Act prohibiting unregistered persons from transacting business as dealer or salesman, where defendant misrepresented to victims that he had invested their money in stock options when, in fact, he never purchased stock options and where state's evidence showed only that defendant gave victims false impression that he was "broker" or "licensed broker"; statute prohibits transacting business without being registered, not offering to transact business without being registered. G.S. § 78A-36(a).

See publication Words and Phrases for other judicial constructions and definitions.

2. Securities Regulation ⇐195

Evidence that defendant advised victims, for 10% commission, to invest in securities of corporations and that defendant told victims that value of these securities would increase by various amounts in future, promising extravagantly large returns on their original investment, would support indictment under statute prohibiting person who receives consideration for advising another person as to value of securities or their purchase from defrauding other person, or engaging in acts that operate as fraud or deceit upon other person. G.S. § 78C-8.

3. Criminal Law ⇐814(6)
False Pretenses ⇐38

Although jury was not instructed on specific misrepresentation alleged in indictments charging obtaining property by false pretenses, there was no fatal variance between indictment, proof, and instruction, where state's evidence showed that defendant obtained property (victims' money) by false pretenses (statements that defendant was "broker" or "licensed broker" and that their money would
options). G.S. § 14-

4. Criminal Law ⇐

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Challenge for cause Juror Number 1, Mrs. Clayton, respectfully, and challenge for cause respectfully also the feelings of Juror Number 10, Mrs. Sanford.

THE COURT: Mrs. Clayton and Mrs. Sanford are with the defense for the limited issue.

MR. GALLOWAY: Thank you, Judge.

Mrs. Clayton, let me ask you some more question about the death penalty matter and that alone. If this trial gets to that point, the Judge will instruct you on the death penalty issue. In other words, this would only be after a verdict were to be returned with regard to first degree murder. Only after a first degree murder verdict had been returned would the Judge instruct you, and the Judge would instruct you that before the jury could return the death penalty that the jury would have to consider certain aggravating circumstances and would not be an automatic matter of imposing the death penalty, but you would be then directed to consider whether there were extra aggravating circumstances over and above the fact that a first degree murder had been convicted -- that a first degree murder had been committed.

So I am asking you now, are there any circumstances, any aggravating circumstances where

under any circumstances at all you might consider that a person was guilty of first degree murder might should have the death penalty imposed? Are there some circumstances that are so bad that you would consider imposing the death penalty?

MRS. CLAYTON: Might be.

MR. GALLOWAY: You think that there might be some such circumstances?

MRS. CLAYTON: Yeah.

MR. GALLOWAY: Okay. Let me ask Mrs. Sanford, remembering what I just told Mrs. Clayton about the Judge instructing you on the second phase and the Judge would instruct you that you would return a verdict of death only if there were certain aggravating factors over and above the fact that a first degree murder had been committed, only then if you were satisfied of the aggravating circumstances and other instructions, would you consider imposing the death penalty?

MRS. SANFORD: No.

MR. GALLOWAY: So what I am asking you is this. Are there any circumstances at all that you could conceive of under any circumstances that you might think that you would be -- that the death penalty would be appropraite?

MR. BREWER: Objection, State vs. Bracey,

303 N.C., 112.

THE COURT: Approach the bench.

(Side-bar conference was held by the Court, Mr. Brewer, Mr. Galloway, Mr. Currin and Mr. Tolin.)

THE COURT: Objection is sustained. You may rephrase the question.

MR. GALLOWAY: Mrs. Sanford, I am not asking you to conceive of any circumstances -- to say what the circumstances might be, but I'm asking you are there some circumstances under which you think that a first degree murder would be so heinous or so horrible that you would feel that the death penalty would be appropriate punishment? Do you think that there might be some circumstances that are that aggravated?

MRS. SANFORD: Well, because of my type of religion, I feel that nobody should kill another human being even though, like I say, sometimes it does happen. But I still feel like no person should take another person's life.

MR. GALLOWAY: Okay. And I thank you.

Mrs. Clayton, the Judge would instruct you that there would be aggravating circumstances that you were to consider, and he would tell you what those circumstances might be. And then again, this

is in the second phase of the trial if we reach that. Then after that, the Judge would allow you to consider certain mitigating circumstances if the facts are there. And so then it would be your job -- this is after the first degree murder verdict has been returned, it would be your job to determine has the State satisfied you beyond a reasonable doubt that there are these aggravating circumstances, and then you would consider the mitigating circumstances, and after you have considered those circumstances, then you would decide whether or not the aggravating circumstances would outweigh the mitigating circumstances, and then and only then would you be to the point of deciding to vote for or against the death penalty. So with that in mind, do you feel that --

MR. BREWER: Objection to statement of law by counsel as not being a complete statement.

THE COURT: Sustained.

MR. GALLOWAY: Would the Court wish to give an instruction at this time?

THE COURT: All right. Ladies and gentlemen of the jury, this second proceeding which I will refer to as the sentencing proceeding, is only reached if at the first proceeding, which I'll call the guilt or innocence proceeding, the jury should find the

defendant guilty of first degree murder.

Now, if the second proceeding is reached, the sentencing proceeding, the law provides that it is the duty of the jury to recommend that the defendant be sentenced to death if the State satisfies the twelve jurors beyond a reasonable doubt of three things. First, that one or more of the aggravating circumstances set forth by statute, that is, by law exist. Second, that any mitigating circumstance or circumstances found to exist is or are insufficient to outweigh the aggravating circumstance or circumstances found. And third, that the aggravating circumstance or circumstances are sufficiently substantial to call for the imposition of the death penalty when considered with any mitigating factor or factors found by the jury to exist. If the State fails to satisfy the jury of all of these three things beyond a reasonable doubt, it is the duty of the jury to recommend life imprison.

You may proceed with further questions.

MR. GALLOWAY: Thank you, Judge.

Mrs. Clayton, with that in mind, and bearing in mind that the death penalty phase will deal with the aggravating circumstances, do you understand -- do you understand that? If there is something about that that you don't understand or for that matter

would leave you to say yes, in this case death is appropriate?

MR. PIERCE: Yes, sir.

MR. GALLOWAY: Okay. Now, earlier the Judge gave you instructions to the panel at the time that you were seated out here.

MR. PIERCE: Yeah.

MR. GALLOWAY: I will endeavor as best I can to recall that to you, but the idea is that the Court will allow you to consider certain aggravating factors and the State must satisfy you of these aggravating factors beyond a reasonable doubt before you would go on. Do you understand that?

MR. PIERCE: Yes, sir.

MR. GALLOWAY: Now, if there is anything that I am telling you that you don't understand or that you want to ask me about, please say so, because this is your chance to talk to us.

MR. PIERCE: Yeah.

MR. GALLOWAY: Okay. Then after the State has shown you or has put forth aggravating circumstances and after you have decided whether or not you believe them beyond a reasonable doubt, then you would consider are there any mitigating circumstances. In other words factors that would lead you to say, well, maybe

I should not impose the death penalty, and those are factors that will come out of the evidence or the lack of the evidence; you understand that?

MR. PIERCE: Yeah, I understand.

MR. GALLOWAY: In other words, aggravating factors are the ones that lead you to want to impose the death penalty; mitigating on the other side.

MR. PIERCE: Yeah.

MR. GALLOWAY: And then you would weigh those and only after have done that would you be in the position of deciding should I vote to impose the death penalty; do you understand that?

MR. PIERCE: Yeah, I understand.

MR. GALLOWAY: Under that scheme of analyzing things, do you think that there are circumstances in which you could consider imposing the death penalty, and I'm not asking you to say what the circumstances are, but are there circumstances where you could do that?

MR. PIERCE: Yes, sir.

MR. GALLOWAY: Okay. And so earlier you said that -- earlier you said that you -- strike that. I'm trying to understand what you were saying. If I'm understanding your position, you were taking the position that you really did not want the Judge

to tell you this was or was not a death penalty case; is that what you were saying?

MR. PIERCE: Yes, sir.

MR. GALLOWAY: And what you were saying is that you want to have the right to require the State to prove not only this a first degree murder, but you want to require the State to prove that these are aggravating circumstances --

MR. PIERCE: That's exactly what I am saying.

MR. GALLOWAY: And you want the State to prove that to you beyond a reasonable doubt?

MR. PIERCE: That's the only way I would go for the death.

MR. GALLOWAY: Okay. And once the State has done that, then you would consider the mitigating circumstances also, wouldn't you?

MR. PIERCE: Yes, sir.

MR. GALLOWAY: And having done that, you would then -- you would at that point, you would consider is this a death case or is it not?

MR. PIERCE: Yes, exactly.

MR. GALLOWAY: Okay. Now, have I -- have I correctly stated your feelings about it?

MR. PIERCE: Yeah.

THE COURT: Just for clarification, let me interject, the word bifurcated means two parts.

MR. TOLIN: Assuming that this is the law, ma'am, do you feel that the only appropriate penalty for first degree murder is the death sentence or would you require the State to show additional aggravating factors, ma'am?

MR. BREWER: Objection.

THE COURT: Sustained as to the form of the question.

MR. TOLIN: Before you would vote for the death penalty, would you require the State to show beyond a reasonable doubt additional aggravating factors other than the fact that there has been a conviction of first degree murder?

MR. BREWER: Objection.

THE COURT: Sustained.

Ladies and gentlemen of the jury, the second proceeding is only reached if the defendant is found guilty of first degree murder. If that should occur, then the law provides that it is the duty of the jury to recommend in a separate proceeding that the defendant be sentenced to death if the State satisfies the twelve jurors beyond a reasonable doubt of three things. First, that one or more of the aggravating

PUBLISHER'S NOTE:

Page(s) 54 missing in original.

MR. GALLOWAY: Will you have any difficulty in following that?

MR. CROMARTIE: No.

MR. GALLOWAY: Mr. Paylor, do you believe that you could require the State to prove aggravating factors over and above first degree murder before you would vote for the death penalty?

MR. PAYLOR: Yes.

MR. GALLOWAY: And you would consider the defendant's mitigating circumstances?

MR. PAYLOR: Yes, sir.

MR. GALLOWAY: Mr. Clayton, I'll not restate the question, but can you follow those instructions?

MR. CLAYTON: Yes, sir.

MR. GALLOWAY: And Mr. Jones?

MR. JONES: I think so.

MR. GALLOWAY: Okay. Mr. Royal?

MR. ROYAL: Yes.

MR. GALLOWAY: Mr. Ragland?

MR. RAGLAND: Yes, sir.

MR. GALLOWAY: Mr. Day?

MR. DAY: Yes, sir.

MR. GALLOWAY: Any of you -- I know I've come by you quickly, but you've heard what I told all the other jurors and the questions I've asked.

Are there any questions that you have, any reactions that you have about the questions that I asked them that I did not ask you?

MR. CLAYTON: Sir --

MR. GALLOWAY: Yes, sir.

MR. CLAYTON: May I ask one question in regards to the Judge's statement a minute ago regarding mitigating circumstances, did I understand you, sir, to say that they would not have to be proven beyond a reasonable doubt?

THE COURT: That is correct.

MR. CLAYTON: Whereas the aggravating circumstances would have to proven beyond a reasonable doubt?

THE COURT: The burden of proof upon the State is to prove aggravating circumstances beyond a reasonable doubt.

MR. CLAYTON: Right, but mitigating would not be required to be proven beyond a reasonable doubt?

THE COURT: That is correct.

MR. CLAYTON: That's the way I understood it. I just wanted to be sure.

THE COURT: And the jury can consider all of the evidence in determining whether a mitigating

MR. TOLIN: How about you, Mr. Newton, as to requiring the defendant to show mitigating factors? Do you understand mitigating factors? You understand the scheme of this? Would you require him to show mitigating factors before you would consider voting for life imprisonment instead of the death penalty?

MR. NEWTON: I think I would.

MR. TOLIN: You think you would, sir?

(Mr. Newton nods head.)

MR. TOLIN: Is this because you feel, Mr. Newton, on a first degree murder case that death was the only proper penalty?

MR. BREWER: Objection.

THE COURT: Overruled. You may answer that question.

MR. NEWTON: Ask the question again.

MR. TOLIN: I said is the basis of your previous answer that you would require the defendant to give you mitigating factors, is the basis of that answer that you feel that the death penalty is the only proper punishment where there has been conviction of first degree murder?

MR. NEWTON: No.

MR. TOLIN: You do not feel that is the basis?

MR. NEWTON: No.

MR. TOLIN: How about you, Mrs. Long?

MRS. LONG: No.

MR. TOLIN: So you feel that life imprisonment would be an appropriate sentence in some first degree murder cases?

(Mrs. Long nods head.)

MR. TOLIN: How about you, sir?

MR. NEWTON: Me?

MR. TOLIN: Yes.

MR. NEWTON: Yes.

MR. TOLIN: Okay. I'm talking to both of you at one time. I apologize for that.

Ms. Bowes, you have heard the questions about the life sentence or the death penalty, do you feel that the death penalty is the only appropriate sentence in first degree murder convictions?

MS. BOWES: I think so.

MR. TOLIN: You would never vote for life imprisonment?

MS. BOWES: No.

MR. TOLIN: How about you, Mr. Leathers? What's your thoughts about this question, sir?

MR. LEATHERS: I don't know, sir.

MR. TOLIN: Would you like me to ask

the question again, sir?

MR. LEATHERS: Yes, sir.

MR. TOLIN: Do you feel that the death penalty is the only appropriate punishment for first degree murder or in some situations would you agree that a life imprisonment would be appropriate?

MR. LEATHERS: Well, I don't really think that the death sentence is really appropraite on some occasions.

MR. TOLIN: All right, sir.

Mrs. Clayton, how do you feel about this issue?

MRS. CLAYTON: I think the death penalty is the appropriate for some, but I think you also have to consider life imprison on the circumstances.

MR. TOLIN: Mrs. Clack?

MRS. CLACK: I feel that sometimes life imprison would serve better than the death penalty.

MR. TOLIN: Mrs. Bowes, you have indicated that you -- I don't mean to put words in your mouth, ma'am, so if I am wrong, you correct me. But you have indicated that you feel in all first degree murder cases that the death penalty is the appropriate -- is the punishment that should be inflicted?

MS. BOWES: Yes.

MR. TOLIN: Do you feel this way even after what the Judge has charged you with what the law is, ma'am?

MS. BOWES: Pardon?

MR. TOLIN: Do you still feel that way even though the Judge has told you that in some cases life imprisonment is the proper punishment?

MS. BOWES: Yes, I do.

MR. TOLIN: Do you think you would continue to adhere to your beliefs concerning that even after you have been charged as to the law later by the Judge, ma'am?

MS. BOWES: Repeat the question.

MR. TOLIN: Do you think that you would continue to adhere to your strong beliefs concerning the death penalty even after the Judge had charged you as to the law concerning this matter, ma'am?

MS. BOWES: I don't know.

MR. TOLIN: Do you think your beliefs about the death penalty would substantially impair your being able to follow the law as the Judge would give it to you, ma'am, if it were different from what your basic beliefs are?

MS. BOWES: No, I don't think so.

MR. TOLIN: If I may, Mrs. Clack, direct

MR. TOLIN: Your Honor, we would challenge for cause Mrs. Bowes based upon her views of the death penalty.

THE COURT: Mrs. Bowes, do you understand that the second phase is only reached if the defendant if found guilty of first degree murder?

MS. BOWES: Right.

THE COURT: If that stage is reached, it will be the duty of the jury to listen to the evidence presented at that time, listen to the arguments of the attorneys and the Court's instruction as to the law, and it will be the duty of the jury to follow the law in the proceeding. The law calls for the jury to make a recommendation to the judge of death or life. If that proceeding is reached, can you follow the law at that time and consider the law as it is given to you in determining whether to recommend death or life?

MS. BOWES: Yes, I could.

THE COURT: You have stated earlier that your personal belief is that death is the only appropriate sentence --

MS. BOWES: Yes.

THE COURT: -- in a first degree murder case?

MS. BOWES: Yes.

THE COURT: Can you set that aside and dismiss it from your mind if the second proceeding is reached where upon the jury would be called upon to make a recommendation of death or life?

MS. BOWES: I think I could.

THE COURT: I did not hear you, ma'am.

MS. BOWES: I feel like I could.

THE COURT: All right. Would your personal belief in any way substantially impair your ability to follow the law?

MS. BOWES: I would hope not.

THE COURT: You may ask further questions.

MR. TOLIN: Your Honor, we have no further questions.

THE COURT: I have one other question for you. Are you related by blood or marriage to someone in the Person County Sheriff's Department?

MS. BOWES: Yes.

THE COURT: Is that person in the courtroom now?

MS. BOWES: Yes.

THE COURT: All right. Will the attorneys approach the bench.

(Side-bar conference was held by the

of you individually, starting with Mr. Painter, if this question were to be put to you, sir, do you think that simply because he was convicted of first degree murder that in itself would you be inclined to vote for the death penalty and not possibly life imprisonment, sir?

MR. PAINTER: I would to the best of my knowledge.

MR. TOLIN: Are you saying that you would always vote for the death penalty in that situation, sir?

MR. PAINTER: No, not necessarily, no, sir.

MR. TOLIN: Okay. In some circumstances you would vote for life imprisonment?

MR. PAINTER: Yes, sir.

MR. TOLIN: What's your feelings about this matter, Mr. Hutchins?

MR. HUTCHINS: No. That it could be either way.

MR. TOLIN: Do you think there are some cases here you would feel that life imprisonment was a proper punishment, sir?

MR. HUTCHINS: Yes, sir.

MR. TOLIN: Mr. Long, how about you,

which -- if you don't get past it then I think the Judge will probably tell you and other members of the jury that you can find one of several things. You can find this man not guilty if you're convinced he's not guilty by being tried. You can find him guilty of probably second degree murder and possibly first degree murder. It's only of course that if he is found guilty of first degree murder that you go into the second phase of the trial being the sentencing phase where you consider either life -- recommendation of life imprisonment or the death penalty. If we go into that second phase and you are sitting here as a member of the jury panel, do you feel that you could in some circumstances, depending upon the evidence, return a verdict of life imprisonment or would you in your own mind feel that you would have to at any time that you reach that last stage where he has been convicted of first degree murder that you would have to return a verdict to impose the death penalty? How do you feel about that, ma'am?

MRS. SCOTT: You don't have to return the death penalty.

MR. TOLIN: You think there are some circumstances where life imprisonment would be the proper verdict?

MS. O'BRIANT: Yes, sir.

MR. TOLIN: And if the jury were the -- if you were sitting on the jury and if you were to return a verdict of first degree murder, would you be inclined to say that simply because of that that the appropriate punishment would be the death penalty or in some situations would you vote for life imprisonment?

MS. O'BRIANT: Life in prison in some situations.

MR. TOLIN: Your Honor, we think that we will have Mrs. O'Briant excused, sir, so that -- turn you over to your child so you do not have a three-week trial --

THE COURT: I'm sorry, I did not hear you --

MR. TOLIN: I said we would like to have her excused, sir.

THE COURT: All right. Excused by the defense. You may step down.

We'll stop at this time for an overnight recess. At this time, ladies and gentlemen of the jury, I'd like to again give you your duties during this and any other recess, not because I think that you don't remember them, but rather to re-emphasize their importance to you.

MRS. CRUMPTON: Uh-huh.

MR. TOLIN: And I have one for you that I think is equally important, and that is, do you feel in your own mind that there are some cases that a true verdict would be the death penalty and other cases where a true verdict would be life imprisonment, or do you feel that in all cases where the jury goes out on a decision as to punishment that they should always return with a death penalty on a first degree murder conviction? How do you feel about that, ma'am?

Did you understand my question?

MRS. CRUMPTON: Yes, I understand. I heard it yesterday. Circumstances -- evidence -- it would have to be presented to go either way.

MR. TOLIN: You don't have any preconceived idea that you should always return the death penalty?

MRS. CRUMPTON: No.

MR. TOLIN: Your Honor, I think we would like to excuse Mrs. Crumpton, please.

THE COURT: All right. Mrs. Crumpton, you have been excused by the defense. You may step down.

At this time, Madam Clerk, I am going to ask that you call the roll of jurors who were first summonsed to be here this morning.

MR. OAKLEY: I wouldn't hold it against him.

MR. TOLIN: Just based on that fact you would not, sir?

MR. OAKLEY: No.

MR. TOLIN: You understand the two-part trial? We've discussed that at length. I'm sure you have heard many comments about it. If he is found guilty of first degree murder, which of course is one of the many verdicts that you can come back with. Of course it goes to the jury for consideration of punishment, life or death. And Mr. Brewer, of course, has asked you questions about this. And I'm just wondering how you feel -- if a man is convicted of first degree murder, do you believe that he should always have the death penalty?

MR. OAKLEY: Not necessarily. Depends on what --

MR. TOLIN: Would you agree to consider the mitigating -- consider all the factors, and do you think in some situations life imprisonment is appropriate?

MR. OAKLEY: Yes, sir.

MR. TOLIN: Mr. Oakley, under the law concerning the death penalty, the second part of the

trial if in fact the jury returns a death penalty verdict, the State is required among other things to show beyond a reasonable doubt aggravating factors. Would you require them to show aggravating factors beyond a reasonable doubt before you could -- would vote for the death penalty?

MR. OAKLEY: Yes, sir.

MR. TOLIN: Mr. Oakley, have you or your family ever had any dealings -- where you were on the other side of a matter, litigation, with either Mr. Calloway's firm including Mr. Hubbard or Mr. Cates, or me or my firm which would be myself and Mr. Long, bad or good with our firms?

MR. OAKLEY: No, sir.

MR. TOLIN: You've had no dealings with us period; is that correct, sir?

MR. OAKLEY: Yes, sir.

MR. TOLIN: Mr. Oakley, if the defense were to put on psychiatrist or psychologists who testified, would you discount this testimony simply because they were psychiatrist or psychologist?

MR. OAKLEY: No, sir, I wouldn't disregard it.

MR. TOLIN: Sir?

MR. OAKLEY: No, sir.

(Mrs. Winstead nods head.)

MR. TOLIN: There are other possible verdicts, and if any of the other possible verdicts come in by the jury, then that's the end of the case as far as the jury is concerned. But if the jury returns a verdict of first degree murder, then the jury has to go back and reconsider whether to -- the death penalty or life imprisonment should be imposed; you understand that?

MRS. WINSTEAD: Yes, sir.

MR. TOLIN: And do you feel that if the jury is sent out for consideration of punishment, if the conviction is for life -- for the death -- I'm sorry, for first degree murder, do you feel in that situation that the punishment should be death period or do you think in some situations that life imprisonment is appropriate punishment for first degree murder?

MRS. WINSTEAD: The answer is yes, it would be considered.

MR. TOLIN: Okay. You would consider in your deliberations under some circumstances that life imprisonment would be the appropriate punishment?

MRS. WINSTEAD: I would say that it would be.

MR. TOLIN: Yes, ma'am. Is that what you are saying?

MRS. WINSTEAD: Yes, sir.

MR. TOLIN: Before you as a juror would be able to say that he should have the death penalty, would you require the State to put on evidence beyond a reasonable doubt of aggravating factors?

MRS. WINSTEAD: Yes, sir.

MR. TOLIN: And would you feel -- if they didn't would you feel that life imprisonment should be the appropriate punishment?

MRS. WINSTEAD: Yes, sir.

MR. TOLIN: Your Honor, we would ask that Mrs. Winstead be excused, and we apologize for all the questions.

THE COURT: Beg your pardon?

MR. TOLIN: We apologize for all of the questions that we asked.

THE COURT: You are excused and you may step down.

We are going to take a fifteen minute recess right now. Ladies and gentlemen, during the recess do not discuss this case among yourselves or with anyone else. Do not allow anyone to discuss it with you or in your presence. Form no opinion

put on aggravating evidence and of course we can put on mitigating evidence. How do you feel about the death penalty in this type of thing? Do you think that just the mere fact that a person has been convicted of first degree murder that he should automatically receive the death penalty or do you think in some situations that life imprisonment is the appropriate punishment?

MS. CARVER: Well, I really think that under some circumstances they should get life in prison and some they should get the death penalty. Until you hear all the evidence and things like that, you don't --

MR. TOLIN: You don't know. I understand. Ma'am, before you could vote for the death penalty would you require the State to put on proof beyond a reasonable doubt of aggravating factors?

MS. CARVER: Yes, I would.

MR. TOLIN: Your Honor, could we approach the bench, sir?

THE COURT: Yes, sir.

(Side-bar conference was held by the Court, Mr. Galloway, Mr. Brewer, Mr. Currin and Mr. Tolin.)

MR. TOLIN: Your Honor, we would ask that Mrs. Carver be excused, please.

where you think life is proper or do you think death is the only punishment --

MRS. CLAYTON: No, I don't think it is.

MR. TOLIN: -- that should be given in this situation?

MRS. CLAYTON: No, I don't think so.

MR. TOLIN: You understand that the State of North Carolina is required to present aggravating circumstances that you must believe beyond a reasonable doubt before you can return the death penalty? Do you understand that, ma'am?

MRS. CLAYTON: Yes.

MR. TOLIN: Would you require them to do so?

MRS. CLAYTON: Yes.

MR. TOLIN: Your Honor, we are satisfied with Mrs. Clayton as an alternate juror.

THE COURT: Now, ladies and gentlemen, twelve of you have been selected and two alternates selected by the State and the defendant to try this case. Before we go further, I must ask you this. Do any of you have any physical condition that you think it's appropriate to bring to the Court's attention at this time concerning your ability to sit and listen

psychiatric testimony?

MS. CRAWLEY: No, sir.

MR. TOLIN: There's a good likelihood that Mr. Price will not testify in this trial. Would you consider this as indication of his guilt because he does not testify?

MS. CRAWLEY: No, sir.

MR. TOLIN: You wouldn't expect him to testify?

MS. CRAWLEY: No, sir.

MR. TOLIN: Okay. Looking at the second phase of this trial that may come about, Ms. Crawley, you understand that of course there are other verdicts, of course, that the jury could come back with, not guilty, second degree murder, but -- and if they come back with those verdicts or other verdict that the Judge may charge on, that the jury would not go in for a second deliberation. But if the jury decided that Mr. Price was guilty of first degree murder then they would go back and deliberate punishment, and their two options would be recommendation of life imprisonment or recommendation of death penalty. Do you believe that the mere fact that he is charged or would be convicted of first degree murder, if that in itself is sufficient reason to have the death penalty

or would you require other factors -- other aggravating factors to be presented before you would vote for the death penalty?

MS. CRAWLEY: Aggravating factors.

MR. TOLIN: You think there are some situations where life imprisonment would be the appropriate punishment?

MS. CRAWLEY: Yes, sir.

MR. TOLIN: For the crime of first degree murder?

MS. CRAWLEY: Yes, sir.

MR. GALLOWAY: May we approach the bench?

THE COURT: Yes, sir.

(Side-bar conference was held by the Court, Mr. Tolin, Mr. Brewer, Mr. Currin and Mr. Galloway.)

MR. TOLIN: Your Honor, we would ask that Ms. Crawley be excused.

THE COURT: You have been excused by the defense. You may step down.

Madam Clerk, call an alternate juror.

THE CLERK: Gertrude B. Wilson.

THE COURT: Ms. Wilson, you have been here since yesterday morning; is that correct?

MS. WILSON: Yes, sir.

THE COURT: Do you know the defendant,

MS. VAUGHAN: Yes.

MR. TOLIN: You would have trouble doing that?

MS. VAUGHAN: No, I wouldn't have any trouble.

MR. TOLIN: Okay. Ms. Vaughan, you are aware, I'm sure you have been told, concerning the fact that there are several verdicts that the jury may come back with, possibly a not guilty plea, second degree murder, possibly other verdicts, and of course the worst verdict would be a first degree conviction. And you understand that only if they come back with first degree -- a first degree conviction that it would go back to the jury for a second decision as to punishment; do you understand how that process works?

MS. VAUGHAN: Yes.

MR. TOLIN: I think you've heard much about it sitting in here. I'm sure.

MS. VAUGHAN: Yes.

MR. TOLIN: Of course you understand you could -- the jury could either come back with a recommendation of life imprisonment or death penalty. Assuming that there was -- let me ask you -- I'll rephrase that. Would you require the State to show

PUBLISHER'S NOTE:

Page(s) 76 missing in original.

case is to -- to do a part. Everyone -- every part of this court proceeding has a particular function. The State's is to present evidence for conviction. Ours is to present evidence for acquittal or for mitigation. The Judge's is to keep us lawyers in line and to instruct you on the law, and yours is to find the facts. Law enforcement's position is to help the D.A. in marshalling the evidence. So everyone has a function in this trial. And what we are trying to do is to arrive at our feelings about who can best serve that function, and who can best render a verdict based on the instructions that the Judge will give you and based on the principles of law that will apply.

I am going to ask you some questions about the sentencing phase of this case should it be reached. We're on -- we're on the horns a dilemma when we ask you about that because we contend that you should not reach that phase of the case. We are contending that he should be found not guilty or in the alternative, he should be found guilty of a lesser offense of second degree murder. And we are contending from the outset that the -- the sentencing phase of this trial should not be reached. And you remember from the Judge's instructions that you will reach the guilt -- I'm sorry. You will reach the life or

death question only if you have found or the jury finds the defendant guilty of first degree murder, that is, premeditated murder. Still I am going to ask you some questions about the -- about the death phase in the event that that phase should be reached. Please understand that we are contending that that stage should not be reached.

I want -- I'm not asking you to state an opinion about what you would do on a particular bit of evidence. I do not want your opinion and I do not want to stake you out, but we do have a certain type of evidence which we would ask you to consider at the guilt phase. This is a type of evidence which some people are just predisposed not to believe in. And we would ask you at this point to consider whether or not you would be so predisposed not to believe in this type of evidence that you would have difficulty in following any instructions that the Judge might give you with regard to that sort of evidence.

Now, I am going to preface my remark by saying the Judge may or may not instruct on this. I am not saying that the Judge will instruct on it and I am not even saying that that instruction will come in. But I am asking you to tell me if you have an opinion or if you have a predisposition against

this type of evidence that is so strong that it would make it difficult for you or impossible for you to consider the Judge's instructions with regard to this type of evidence. The -- you may remember yesterday that the Judge gave you some instructions on the death penalty phase, and once you find the defendant guilty -- once the defendant is found guilty of first degree murder, then the State must satisfy you beyond a reasonable doubt of certain aggravating factors. Then if, and only if, you believe that there are aggravating factors, you must determine whether or not the mitigating factors are present and whether they outweigh the aggravating factors.

Are you with me so far? Does anyone not understand what I am talking about? We're talking now -- I'm drawing your attention to mitigating factors. And we will attempt to introduce evidence -- and again, I am not forecasting what the Judge will instruct you on, but in the event that you are asked by the Judge to consider whether the defendant was under the influence of a mental or emotional disturbance as a mitigating factor -- this is not in the guilt phase, but as a mitigating factor, I want to know if he were to instruct you to consider that, whether you feel that you would be so opposed to utilizing

mental disturbance as mitigating any act that you convicted him of, whether you would be so opposed to that that you couldn't follow the Judge's instructions on that as a mitigating factor.

So let me ask Mr. Kimbrough, do you feel that if under this circumstance, if you were asked by the Court to consider as a mitigating factor was he subject to a mental or emotional disturbance, do you feel that you would give that some consideration or would you say, on the other hand, no, that just does not make any difference; I am not going to consider that?

MR. KIMBROUGH: Yes, sir, I would consider it.

MR. GALLOWAY: You would consider the mental or emotional disturbance?

MR. KIMBROUGH: Yes, sir.

MR. BREWER: Your Honor, I am going to object to this.

THE COURT: Well, objection is sustained to the length of the statement prior to getting to a question, but you may go forward with your question.

MR. GALLOWAY: Thank you.

Mrs. Clay, let me ask you, would you disregard any evidence in mitigation to the effect

Mr. Kimbrough, do you feel that you could follow those instructions?

MR. KIMBROUGH: Yes, sir.

MR. GALLOWAY: Do you feel that you fully understand those instructions?

MR. KIMBROUGH: Yes, sir.

MR. GALLOWAY: Mrs. Clay, do you feel that you would have any difficulty requiring the State to prove to you beyond a reasonable doubt any aggravating factors in a second phase of the case?

MRS. CLAY: No.

MR. GALLOWAY: Would you then be able to follow the Judge's instructions regarding the burden on the defendant with regard to any mitigating circumstances? Could you -- do you recall the instruction the Judge just gave?

MRS. CLAY: Yes.

MR. GALLOWAY: Do you feel that you would be aided if he would reinstruct on that or do you believe you understand them?

MRS. CLAY: I think I understood it.

MR. GALLOWAY: Okay. Do you believe that you could follow those instructions?

(Mrs. Clay nods head.)

MR. GALLOWAY: Mrs. Batten, do you believe

Connan George saw defendant on 19 October 1984. (Tpp. 1905-06) He paid defendant fifteen dollars for a rifle on that morning. (Tp. 1906) When he saw defendant at his earlier trial, he appeared normal. (Tp. 1907)

Mary Jane Smith saw defendant at her house on 20 October 1984. At that time, he appeared "all right" and not under the influence of drugs or intoxicants. (Tp. 1908) He was, however, in a hurry. (Tp. 1909)

JURY SELECTION ISSUES

I. **THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN PREVENTING DEFENDANT FROM QUESTIONING A PROSPECTIVE JUROR CONCERNING HIS POSITION AS TO THE REQUIREMENT THAT AGGRAVATION MUST BE PROVED TO JUSTIFY A SENTENCE OF DEATH AND PREVENTING DEFENDANT FROM USING HIS CHALLENGES KNOWINGLY AND INTELLIGENTLY, THEREBY DENYING HIS FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO A FAIR TRIAL, DUE PROCESS OF LAW, AND THE HEIGHTENED DEGREE OF RELIABILITY DEMANDED OF CAPITAL PROCEEDINGS.**

Assignment of Error No. 8, Rp. 242
Exception No. 7, Tp. 204
Exception No. 8, Tp. 204
Exception No. 9, Tp. 204

During the early stages of the jury selection proceedings, defendant attempted to question a prospective juror regarding his feelings about the law in the consideration of aggravating circumstances. The trial court sustained the prosecutor's objection to this question and effectively precluded this line of inquiry. (Tp. 204) Defendant indicated his desire to question all prospective jurors on this matter, essentially asking for a live

objection to the court's ruling. *See Duke Power Company v. Winebarger,* 300 N.C. 57, 265 S.E.2d 227 (1980). A trial court may not unduly restrict the efforts of defense counsel to question prospective jurors in an effort to ascertain who might be challenged for cause and to exercise peremptory challenges intelligently. *E.g., State v. Williams,* 286 N.C. 422, 212 S.E.2d 113 (1975). The sixth amendment endows defendant with the guarantee of an impartial jury in accordance with rudimentary due process. *Ristaino v. Ross,* 424 U.S. 589, 595 n.6 (1976). A corollary to the right to an impartial jury is the opportunity to take reasonable steps, primarily through the jury selection process, to ensure juror impartiality. Defendant's challenges to potential jurors, either for cause or peremptory, may well be the most important devices designed to feret out latent prejudices in potential jurors. *See Pointer v. United States,* 151 U.S. 396 (1894). The undue restrictions imposed upon defendant's *voir dire* of potential jurors was particularly egregious in this case since it prevented him from ascertaining whether prospective jurors could follow the law with respect to sentencing. In the context of the present case, the trial court's action constituted reversible error.

David M. Kimbrough was one of the twelve prospective jurors passed to the defense by the prosecution. Near the beginning of defendant's questioning of Kimbrough, he asked whether Kimbrough felt it should be necessary for the state to prove aggravation in addition to premeditated and deliberated murder before he could determine whether to impose a sentence of death. The prosecutor's objection to this question was sustained. Defendant rephrased his inquiry, which was also precluded by the trial court. (Tp. 204) The trial court erred in sustaining the objections since the questions were not designed to "stake out" the juror with respect to a particular verdict or decision that he might make in the particular case. *See State v. Phillips,* 300 N.C. 678, 268 S.E.2d 452 (1980). Rather, the questions were designed to determine if the prospective juror had prejudices or attitudes, latent or otherwise, that might influence

his ability fairly and impartially to consider both aggravating and mitigating evidence in a capital case. Furthermore, whether he thought, as a personal matter, the state should be required to prove aggravation *in addition to* proving a first-degree murder in order to obtain a sentence of death strikes at the heart of his ability to be fair and impartial. The purpose of inquiry during *voir dire* is to eliminate extremism and partiality. *See State v. Honeycutt,* 285 N.C. 174, 203 S.E.2d 844 (1974), *death sent. vacated,* 428 U.S. 903 (1976). Given the capital nature of this case and the importance of jurors being able fairly and impartially to consider mitigating evidence, the inability to conduct reasonable questioning designed to investigate a prospective juror's ability to consider aggravation and mitigation and then weigh them created an unacceptable risk that defendant might receive the death penalty. The risk that an inability to consider the relevant, evidence objectively and impartially may have infected defendant's capital sentencing is unacceptable in light of the ease with which it could have been minimized.

The Supreme Court of the United States applied this notion in the context of jury selection in a capital case. *E.g., Turner v. Murray,* 476 U.S. 28 (1986). *Turner* teaches "that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." *Id.* at 36-37. The court determined this rule was "minimally intrusive" because "the trial judge retains discretion as to the form and number of questions on the subject, including the decision whether to question the venire individually or collectively." *Id.* at 37. Although the court limited its decision to capital sentencing proceedings in which race was likely an issue, the risk attending an inability to consider mitigation in a capital case creates the same "special circumstances" evident in *Turner.* Furthermore, in an earlier decision, the court had found reversible error where a trial court refused to allow a young black defendant, who was charged with possession of marijuana and known as a civil rights activist, to question prospective jurors regarding

racial prejudice. *E.g., Hamm v. South Carolina,* 409 U.S. 524 (1973). In certain circumstances, then, particularly in capital cases, undue restrictions on a defendant's questioning of prospective jurors implicates constitutional rights.

Aside from the constitutional implications of the trial court's ruling in light of *Turner,* the preclusion of this inquiry contravened the basic principles regarding jury selection in this jurisdiction. Recently, the North Carolina Court of Appeals awarded a defendant a new trial based upon restrictions on his *voir dire* of prospective jurors. The trial court had precluded the defendant from inquiring of jurors whether they "felt" that the defendant was guilty because he had a gun in his hand despite what the circumstances surrounding the event might have been. The court concluded that "[a]sking jurors 'Do you feel' questions is qualitatively different from asking jurors 'What would you do?'. Questions dealing with feelings neither stake out, call for speculations, nor require answers to legal questions." *State v. Parks,* 92 N.C. App. 181, 184, 374 S.E.2d 138, 140 (1988), *rev'd,* ___ N.C. ___, 378 S.E.2d 785 (1989). Although this Court reversed on the specific facts involved, it did not dispel the conclusion that:

> the disallowance of the proper voir dire question prevented counsel from inquiring further into the attitudes of jurors and from exercising intelligently peremptory challenges allowed by law.

Id. at 185, 374 S.E.2d at 140-41. Rather, it held that on the facts in *Parks*; the question improperly "asked what kind of a verdict [the juror] would render under certain named circumstances." It also did not dispute the following notion of the Court of Appeals:

> By disallowing the excepted-to voir dire questions, the trial judge prevented defendant from ascertaining whether a challenge for

> cause existed and further prevented defendant from intelligently exercising his peremptory challenges.

Id. at 185, 374 S.E.2d at 141. The jury selection process is certainly an importan method, indeed perhaps the most important method for obtaining information designe to assure defendant an impartial jury. *See generally* Gobert, *In Search of the Impartia Jury*, 79 J. Crim. L. & Criminology, 269, 312-23 (1988). As this Court has explained:

> "The voir dire examination of jurors is a right secured to the defendant by the statutes and has a definite double purpose: First, to ascertain whether there exist grounds for challenge for cause; and, second, to enable counsel to exercise intelligently the peremptory challenges allowed by law."

State v. Allred, 275 N.C. 554, 558-59, 169 S.E.2d 833, 835 (1969) (quoting *State v. Brooks*, 57 Mont. 480, 486, 188 P. 942, 943 (1920)).

The federal courts have been vigilant in protecting a criminal defendant's right adequately to question prospective jurors. Reversible error occurred where *voir dire* was not allowed regarding possible juror acquaintance with particular government witnesses. This restriction on questioning was erroneous because "defendant had a right to have the question asked to afford him an opportunity to exercise his peremptory challenges intelligently." *Cooke v. United States*, 379 F.2d 966, 971 (5th Cir. 1967). Similarly, reversible error occurred where a defendant was precluded from inquiring whether prospective jurors would tend to accord additional credibility to witnesses merely because they were law enforcement officers. *United States v. Baldwin*, 607 F.2d 1295, 1296-97 (9th Cir. 1979). As the Fourth Circuit noted, "these uncertainties prevented [defendant] from meaningfully and intelligently exercising his challenges." *United States v. Brown*, 799 F.2d 134, 136 (4th Cir. 1986); *accord United States v. Jackson*, 542 F.2d 403, 413 (7th Cir. 1976); *United States v. Segal*, 534 F.2d 578, 581 (3rd Cir. 1976).

> [J]urors . . . are "a part of all that [they] have met." Jurors . . . have natural inclinations and favorites, and they sometimes, at least on a subconscious level, give the benefit of the doubt to their favorites. So jury selection, in a real sense, is an opportunity for counsel to see if there is anything in a juror's yesterday or today that would make it difficult for that juror to view the facts, not in an abstract case, but in a particular case, dispassionately. . . . [P]rohibiting defense counsel from questioning potential jurors as to their willingness and ability to follow the judge's instructions limiting their consideration of the defendant's prior record to the issue of his credibility was error . . . .

State v. Hedgepeth, 66 N.C. App. 390, 398, 310 S.E.2d 920, 924 (1984).

Similarly, defendant was entitled to question prospective jurors regarding their attitudes about aggravation and the burden on the state to prove it. Defendant's effort to make this precise inquiry was thwarted by the trial court's ruling. This error was particularly egregious not only because of the capital nature of this proceeding, but also in light of empirical data suggesting that some types of mitigation, despite the presence of aggravation, may lead to the imposition of a life sentence by a jury in capital cases. *See generally* White, *Juror Decision Making in the Capital Penalty Trial*, 11 Law & Hum. Beh. 113 (1987). The actions of the trial court below violated defendant's right to question prospective capital jurors in an effort to ensure fairness and impartiality with respect to the death penalty. *E.g., State v. Adcock*, 310 N.C. 1, 310 S.E.2d 587 (1983); *accord State v. Ziebert*, 34 Or. App. 497, 579 P.2 275 (1978). The questions tendered by defendant, to which the prosecutor's objections were sustained, were in no way repetitious or irrelevant. *E.g., State v. Huffstetler*, 312 N.C. 92, 322 S.E.2d 110 (1984), *cert. denied*, 471 U.S. 1009 (1985).

Quite plainly, the undue restrictions placed upon defendant during his *voir dire* of prospective jurors precluded him from meaningfully and intelligently exercising his peremptory challenges. Furthermore, it blocked his efforts to uncover latent prejudices in the form of juror inability fairly and impartially to consider the relevant factors in

aggravation and mitigation in a capital proceeding. An unacceptable risk exists, in light of the broad discretion accorded defendant's jury and the special seriousness attending any capital case, that the inability fairly to consider relevant the appropriate sentencing factors infected the sentencing proceeding. Under the dictates of *Turner* and the general principles regarding jury selection proceedings in this jurisdiction, defendant's conviction must be reversed.

II. THE PROSECUTOR UNCONSTITUTIONALLY EXERCISED PEREMPTORY CHALLENGES TO EXCLUDE JURORS WHO EXPRESSED EVEN THE SLIGHTEST RESERVATIONS ABOUT IMPOSING THE DEATH PENALTY, THEREBY DENYING DEFENDANT HIS CONSTITUTIONAL RIGHTS TO AN IMPARTIAL JURY, A FAIR TRIAL, DUE PROCESS OF LAW, AND FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT.

Assignment of Error No. 2, Rp. 63
Exception No. 5, Tp. 103
Exception No. 6, Tp. 157
Exception No. 12, Tp. 482

During the jury selection proceedings, the prosecutor exercised three peremptory challenges to excuse potential jurors who expressed some hesitancy about being able to return a death sentence. (Tpp. 103, 157, 482) This process systematically denied defendant his federal and state constitutional rights to be tried by an impartial jury and one composed of a fair cross-section of the community. U.S. Const., amend. VI. By depriving defendant of an impartial and representative jury, this process implicates his constitutional protection of freedom from cruel and unusual punishment by denying him a capital proceeding afforded the heightened reliability demanded by the eighth amendment. In doing so, it "produced a jury uncommonly willing to

No. 585 A 87 NINTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA
v.
RICKY LEE PRICE

From Person

DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF

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C. **The Unconstitutional Restrictions On Defendant's Voir Dire Cannot Be Deemed Harmless Beyond A Reasonable Doubt.**

Having established the existence of federal constitutional error, the prosecution bears the substantial burden of demonstrating this error was harmless beyond a reasonable doubt. N.C. Gen. Stat. §15A-1443(b); *see Chapman v. California*, 386 U.S. 18 (1967). The trial court plainly sustained consistent objections to defendant's repeated efforts to inquire into the abilities of various prospective jurors to consider fairly the evidence in the context of the North Carolina capital sentencing process. (Tpp. 182-83, 190, 203, 283, 323) Defendant was specifically thwarted in his efforts to ask David Kimbrough if he would consider it important and necessary for the prosecution to prove aggravating factors in addition to a premeditated and deliberate murder before he would recommend the sentence of death. (Tpp. 182-83) Kimbrough eventually sat on defendant's jury and, in fact, served as the foreperson. [App. 1] As in *Morgan*, the seating of a juror whom defendant was precluded from questioning in a constitutionally permissible fashion requires relief.

As with Kimbrough, defendant made an effort to question prospective juror Rollie D. Long regarding whether he would require the prosecution to show aggravating factors before he would vote for the death penalty. The trial court sustained the prosecutor's objection to defendant's question to Long regarding whether he would "require the State to show aggravating [factors] before you would vote for the death penalty?" (Tp. 323) Long also sat on defendant's jury.

It is also significant that the prosecution engaged prospective jurors in inquiries about their feelings and attitudes toward capital punishment. Indeed, the prosecutor told prospective jurors, "it is appropriate for the State to ask you about your feelings

about the death penalty and whether or not that would affect your deliberations in this case." (Tp. 71) The prosecutor proceeded to question prospective jurors frequently about their feelings and attitudes toward capital punishment. (Tpp. 77-79, 87, 89, 105, 107, 127-28, 163) Assuming these questions are permissible both to allow the state to exercise intelligent challenges for cause and to make reasonable decisions about the use of its peremptory challenges, defendant is entitled to a similar opportunity. Because he did not receive such a similar opportunity, the constitutional error in this case cannot be deemed harmless beyond a reasonable doubt.

Morgan establishes that it is no longer sufficient, consistent with due process, merely to ask prospective jurors if they would follow the law in a capital case. Rather, a defendant must be able to "specifically inquire of each prospective juror" whether that individual would be inclined automatically to impose a sentence of death upon defendant's conviction for first degree murder. *United States v. Escobar*, 803 F. Supp. 611, 617 (E.D.N.Y. 1992). The rationale behind this emerging constitutional principle hinges partially on the phenomenon that jurors misunderstand trial court instructions in capital sentencing proceedings. This misunderstanding is becoming a pervasive problem. *Id.* at 618. Given this potential for misunderstanding the law, it is imperative for a capital defendant to be able to inquire fully and completely about a prospective juror's understanding of each aspect of the capital sentencing process and that person's personal and individual ability to follow each aspect of the law.

> Jurors - whether they be unalterably in favor of or opposed to the death penalty in every case - by definition are ones who cannot perform their duties in accordance with the law, their protestations to the contrary notwithstanding.
>
> . . . [S]uch jurors could in all truth and candor respond affirmatively, personally confident that such dogmatic views are fair and impartial, while leaving

> the specific concern unprobed. . . . It may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so. A defendant on trial for his life must be permitted on *voir dire* to ascertain whether his prospective jurors function under such misconception.

Morgan, 119 L.Ed.2d at 508. As in *Morgan*, defendant was entitled to probe the beliefs and attitudes of prospective jurors to ascertain if any one of them harbored such a bias in favor of death or a particular revulsion to first degree murder so that the prospective juror would be substantially impaired in the ability to consider a life sentence once the prosecution proved a premeditated and deliberate murder. Defendant did not receive that opportunity in this case. Since several prospective jurors to whom he posed relevant and constitutionally required questions sat on his jury, the error cannot be deemed harmless beyond a reasonable doubt. Accordingly, the judgment against defendant must be vacated.

A Well, one time I went there because I couldn't get along with my momma and daddy, and I was disrespecting them.

Q You still insist that you did not kill Brenda Smith?

A I didn't kill her or Joan.

Q You were with her when she made a telephone call to her mother at 8:42 a.m.?

A I didn't know -- I didn't deny going and picking her up and going off with her and her calling her mother.

Q And she was dead an hour and a half later and her car was seen at the scene and yet you say you had her car?

A I was driving her car.

Q You were driving her car?

A I took her to work.

Q You used to farm down in that area some, didn't you, for one of your uncles or cousins?

A I -- it wasn't Person County. It was Semora, North Carolina.

Q That was for Lawrence Terry?

A In Semora, yeah.

Q In Person County?

A Semora's not in Person County. That's like

on the person.

Q So if there are days -- so when the defendant is not on Lithium, he can be dangerous?

A Yes.

Q Did the defendant tell you that he killed the two girls particularly the girl Brenda Leigh Smith?

A Sort of.

Q What did he say in that regard?

A He said that -- relating to Joan -- is it Bates?

Q Joan Brady was the girl killed in Virginia and Brenda Smith was the girl killed two days later.

A Thank you. I'm abbreviating this as J.B. here, Joan B. He said that there was a series of minor arguments, boyfriend-girlfriend. Washing clothes. She threw beer at me. I slapped her twice and she threatened to lock me up. She hit my head on the door. I pushed her or grabbed her. I went to the bathroom and came out. Threw her into the bed. She was strangled. I tied her hands behind her back after she was dead. I was going to tie her like an indian movie. She was dead or the word dead after that. That's what he told me about it.

Q Uh-huh. Now, that was Joan?

A Yes.

Q What about the girl who was found in Person

County for which he is presently charged?

Brenda Smith?

A After (indicating) being with her for a day or so, he talks about stopping the car on the side of the road. It was daylight. I put a rag on the rear-view mirror, went walking with Brenda to find a place to have sex. Whenever we did she took her rings off. After we had made love she wanted something to drink. We went to a gas station. She called her mother. I don't remember the argument. Being in a car with her. I went to sleep in the car. She said she had to be at the bowling alley. That was one explanation and then I got another one.

Here it is, I'm sorry. Down below. Ah, she was planning to marry soon. She didn't know that I didn't have a divorce. She started acting crazy, doing -- dating someone before. Said -- apparently said to him, "I was like all the rest. I didn't care about her." And he said I just spent two hundred dollars on her at Busch Gardens the week before. Brenda came back to the car crying and I grabbed her. We were playing -- playing to start. I played too rough. She was lying there dead. I didn't know what to tell her about being married.

Q He grabbed her in the car and he was too rough

PENGAD/INDY MUNCIE IN 47302
SF-2004

and she was dead; is that --

A Yes.

Q Have you been told the facts as to how the deceased was found at the scene? Did the attorneys tell you that the girl was found some distance off the road in a wooded area, face down with her hands tied behind her back with shoelaces?

A Yes, they did.

Q And that the Brady girl was found the same way?

A Yes.

Q And you would agree then that the defendant was not being totally candid with you in his description of what ocurred?

A Yes. Yes. There was no question in my mind that he was not being toally candid because I couldn't find out what he was thinking or exactly what happened which was the --

Q And he would not tell youwhat happened considering as the facts as they were photographed and found by the police to be?

A He didn't trust me enough to tell me much of anything and then he later backed out of this story and said, "No, it didn't happen that way." So I didn't get any information about his thinking process. The

issue that I was originally asked about was his mental state at the time of the crime, and in order to do that you have to have the person tell you what they are thinking at that moment. And I tried very hard to get it and could not.

Q And of course yesterday you were not present in court when the defendant testified?

A No.

Q And he denied killing the girls yesterday. Would -- he would have been lying to the court then at that time or he was lying to you when he said he did?

A No doubt, yes.

Q So some of the facts which the defendant related to you, part of which you based your diagnosis on, were lies?

A Well, those aren't the facts, those are the lies. If you are saying does the defendant lie, yes he does.

Q And the defendant lied to you?

A Yes.

Q All right.

A I think the answer is yes, counsel. It's hard to know on each statement whether it's a lie or truth. Certainly when he told me he didn't kill them and

PENGAD/INDY, MUNCIE IN 47308 SP-2084

No. 93-7348

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

RICKY LEE PRICE,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

RECEIVED
JAN 31 1994
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CERTIFICATE OF SERVICE

I, Barry S. McNeill, a member of the bar of this Court, hereby certify that on the 28th day of January, 1994, one copy of the State of North Carolina's BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA, along with the APPENDIX, was served on the Petitioner's counsel of record, Mr. Gordon Widenhouse, Assistant Appellate Defender, Office of the Appellate Defender, 1905 Meredith Drive, Durham, North Carolina 27713, by first class mail, postage prepaid. I further certify that all parties required to be served have been served.

This the 28th day of January, 1994.

Barry S. McNeill*
Special Deputy Attorney General

Post Office Box 629
Raleigh, North Carolina 27602
(919) 733-3109

*COUNSEL OF RECORD

MICHAEL F. EASLEY
ATTORNEY GENERAL

State of North Carolina
Department of Justice
P. O. BOX 629
RALEIGH
27602-0629

January 28, 1994

Honorable William K. Suter
Clerk, Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

ATTN: Cynthia Rapp

Re: Ricky Lee Price v. State of North Carolina, No. 93-7348
(BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA)

Dear Mr. Suter:

Enclosed for filing are an original and twelve copies of the State of North Carolina's BRIEF IN OPPOSITION to the Petition for Writ of Certiorari filed by Ricky Lee Price, and supporting APPENDIX. Also enclosed are the required Affidavit of Mailing affirming that this BRIEF IN OPPOSITION was mailed timely on Friday, January 28, 1994, along with a Certificate of Service to opposing counsel.

Thank you for your assistance in filing these documents and bringing them to the attention of the Court. Under cover of this letter, I am serving Price's counsel with a copy of the State's BRIEF IN OPPOSITION and supporting Appendix.

Sincerely,

Barry S. McNeill
Special Deputy Attorney General

BSM/dd

cc: Mr. Gordon Widenhouse

RECEIVED
JAN 31 1994
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 93-7348

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RICKY LEE PRICE,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

AFFIDAVIT OF MAILING

I, Barry S. McNeill, being duly sworn, do depose and say:

1. I am counsel of record for the State of North Carolina in this action, and am a member of the bar of this Court.

2. On Friday, January 28th, 1994, at approximately 4:00 p.m., I placed the original and twelve copies of the State of North Carolina's BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA, along with the Appendices, in a properly secure package, addressed to the Clerk of the Supreme Court of the United States, with proper postage affixed (first class postage prepaid), and deposited the package in a mailbox under the exclusive care and custody of the United States Postal Service at the corner of Wilmington and Morgan Streets, Raleigh, North Carolina.

3. To my personal knowledge, this mailing took place within the time permitted under Supreme Court Rules 15.2, 29.2 and 30.4.

This the 28th day of January, 1994.

Barry S. McNeill
Special Deputy Attorney General

Sworn to before me this the
28th day of January, 1994.

Donna R. Douglas
NOTARY PUBLIC

My Commission Expires 12-21-98.

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.....

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

.....

REPLY TO BRIEF IN OPPOSITION

.....

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No. 93-7348

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

.....

RICKY LEE PRICE,
Petitioner,

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STATE OF NORTH CAROLINA,
Respondent

.....

REPLY TO BRIEF IN OPPOSITION

.....

ARGUMENT

Petitioner, Ricky Lee Price, respectfully submits this Reply Brief pursuant to Rule 15.6 of the Rules of this Court in support of the Petition for a Writ of Certiorari docketed in this Court on 29 December 1993. This brief addresses responsive arguments first made in Respondent's Brief in Opposition to Petition for Writ of Certiorari.

I. FAILING TO PERMIT CAPITAL SENTENCER TO CONSIDER AND GIVE EFFECT TO PETITIONER'S EXISTING LIFE SENTENCE VIOLATED LOCKETT, PENRY, AND GARDNER.

This issue focuses on the relevance, as rebuttal to aggravation and as mitigation, of the life sentence petitioner had just begun serving for a separate murder in Virginia -- a murder used as an aggravating factor in this case and about which the sentencing jury heard substantial evidence and prosecutorial argument -- to the jury's determination of the appropriate sentence for this murder in North Carolina. The trial court denied petitioner's request that the jury be instructed on and allowed to consider the Virginia life sentence as a mitigating circumstance. Thus, the jury had no vehicle through which to consider it. The crux of the matter is simply whether this Virginia life sentence is an "aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). It was certainly relevant to explain and rebut the state's evidence and argument about the separate murder used in aggravating the sentence. *Gardner v. Florida*, 430 U.S. 349, 362 (1977). The lower court deemed this evidence "irrelevant," *State v. Price*, 331 N.C. 620, 634-35, 418 S.E.2d 169, 177 (1992), contrary to the letter and spirit of *Lockett* and its progeny. Respondent miscasts the issue as a challenge to the limitations placed on petitioner's closing arguments. [Brief in Opposition at 19-20] To the contrary, the decision below, addressing the relevance of this evidence, is at odds with one of the most settled principles of Eighth Amendment jurisprudence: petitioner's right to have his capital sentencer consider, under appropriate instructions, mitigating evidence.

Respondent argues petitioner "cannot show that this holding is in conflict with any other state or federal court decisions" and the lower court's decision is, therefore,

below is at odds with *Turner v. State*, 573 So.2d 657 (Miss. 1990), *cert. denied*, 113 S.Ct. 1695 (1991). In *Turner*, a capital defendant was entitled to have his status as an habitual felon determined *prior* to his capital sentencing hearing so he could argue the effect of that determination to his sentencing jury. If deemed an habitual felon in Mississippi, any life sentence his capital sentencing jury imposed would be life without parole. The Mississippi Supreme Court held he was constitutionally entitled to present this information to the capital sentencing jury. *Compare Bruce v. State*, 569 A.2d 1254 (Md. 1990) and *State v. Henderson*, 789 P.2d 603 (N.M. 1990) (holding capital defendant's ineligibility for parole may not be constitutionally withheld from sentencing jury), with *Commonwealth v. Henry*, 569 A.2d 929 (1990), *cert. denied*, 111 S.Ct. 1338 (1991), and *Williams v. Commonwealth*, 360 S.E.2d 361 (Va. 1987) (holding unavailability of parole irrelevant to jury's capital sentencing decision).

This division of authority led to the grant of certiorari in *Simmons v. South Carolina*, No. 92-9059 (argued 18 January 1994). *Simmons* will decide whether a capital defendant's ineligibility for parole is relevant to the sentencing jury's decision. Due process entitles a capital defendant to explain evidence of a prior crime upon which the state bases an aggravating factor or upon which the prosecutor bases an argument about future dangerousness. *See Gardner v. Florida*, 430 U.S. 349, 362 (1977). Petitioner was denied this opportunity. Thus, *Simmons* would have a direct bearing on the disposition of this case.

Respondent urges this Court not to hold this petition pending a decision in *Simmons*, asserting it inapplicable because North Carolina, unlike South Carolina, does not have life without parole. [Brief in Opposition at 23 n.3] But *Simmons* will address the underlying rationale for the lower court's decision: whether evidence of a life sentence imposed on petitioner in another jurisdiction is relevant to the sentencing

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Respondent's reliance on *California v. Ramos*, 463 U.S. 992 (1983), is equally unavailing. *Ramos* rejected a constitutional challenge to a California jury instruction that the governor could commute a sentence of life without parole to a sentence under which parole might be available. This Court reasoned such an instruction gave juries an accurate portrait of the possibility of a defendant's future dangerousness, which was a relevant sentencing determination. *Id.* at 1001-05; *see Jurek v. Texas*, 428 U.S. 262, 274-76 (1976) (holding capital defendant's future dangerousness relevant information for sentencing purposes).[2] Respondent seizes upon the concluding language and footnote in *Ramos* for the proposition that a state may limit mitigating evidence by deeming it irrelevant. [Brief in Opposition at 21-22] Aside from being at odds with the more recent *McKoy* decision, that language is taken out of context. In *Ramos*, this Court acknowledged the power of the states to provide greater protections to a capital defendant beyond the limits on evidence required by the Eighth and Fourteenth Amendments. 463 U.S. at 1013-14. The inverse of that proposition -- that states may limit what evidence of a capital defendant's background, record, or character a sentencer may consider as a basis for a sentence less than death -- is not true. A state is not free to provide lesser protections to a capital defendant that those required by the Eighth and Fourteenth Amendments. *Ramos* not only provides no solace to respondent, but actually demonstrates how the decision below directly conflicts with the settled jurisprudence of this Court.

Finally, respondent never fully comes to grips with the essence of this matter. The trial court unconstitutionally restrained petitioner's ability to have his sentencer consider, based both on instructions by the trial court and after arguments by counsel,

---

[2] *Jurek* actually supports petitioner's claim. Petitioner's jury heard plenary evidence about the Virginia murder. It found an aggravating factor based solely on this Virginia murder. By using this evidence to support an aggravating factor, the state made this aspect of petitioner's background and record part of the case. In doing so, it made the sentence imposed on petitioner for the Virginia murder relevant. It became a basis for a sentence less than death in this case.

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instructions deemed potentially coercive but for the specific information there that the jury could fail to agree on a sentencing recommendation -- an alternative not made available below. Without telling the jury it could fail to agree on a recommendation and still complete its duty, the spector of coercion feared in *Lowenfield* emerged.

Furthermore, respondent cannot explain or challenge the decision below being at odds with the highest courts in Delaware, Florida, Georgia, Louisiana, and New Jersey. [Petition at 35-37, citing cases] Unlike a deadlocked jury in the guilt phase, a deadlocked jury in the penalty phase has made a final decision. No juror in that situation is required to "think it over." *State v. Rush*, 491 A.2d 439, 453 (Del. 1985). The vast majority of jurisdictions considering this issue under very similar supplemental instructions have resolved it favorably to petitioner. This stark conflict, in which North Carolina sits in the distinct minority, and the express reservation of this issue in *Lowenfield*, *see Oregon v. Mathiason*, 429 U.S. 492, 493 (1977) (granting review of lower court's interpretation of *Miranda*), create a matter ripe for this Court's review. A writ of certiorari should issue.

III. THE LOWER COURT'S APPLIED AN INAPPROPRIATE HARMLESS ERROR ANALYSIS TO CONSTITUTIONAL ERROR IN THE FRAMEWORK OF THE CAPITAL SENTENCING PROCESS UNDER MCKOY V. NORTH CAROLINA.

Petitioner suffered grossly unconstitutional sentencing instructions requiring all jurors to agree unanimously that a mitigating factor existed before any juror could consider this evidence in the sentencing decisions. *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990). The lower court, on remand from this Court in light of *McKoy*, found the error harmless, relying on the trial court's polling of the sentencing jury. The

polling process contained the same fatal flaw as the sentencing instructions themselves because a reasonable juror would have understood the polling questions in light of all the instructions given.

The claim here is not, as respondent seems to suggest, whether *McKoy* error can never be harmless. Where no mitigating evidence is presented, *e.g., State v. Hunt*, 330 N.C. 501, 411 S.E.2d 806, *cert. denied*, 113 S.Ct. 3045 (1992), or where the sentencing jury finds all submitting mitigating factors, *e.g., State v. Roper*, 328 N.C. 337, 402 S.E.2d 600, *cert. denied*, 112 S.Ct. 280 (1991), *McKoy* error is arguably harmless.[4] *See McNeil v. North Carolina*, 494 U.S. 1050 (1990) (Kennedy, J., dissenting). Rather, the question here is whether the polling process, as understood by the very jurors poisoned by the unconstitutional unanimity instructions, shows the error was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18 (1967).

Petitioner strongly disputes the lower court's analysis that the *McKoy* error in this case was harmless beyond a reasonable doubt. In this case, the trial court instructed the sentencing jury on at least ten occasions that it *must* answer "no" to a mitigating circumstance if the jury did not agree unanimously as to its existence. [Appendix to Petition at 64-84] For example, with respect to the mitigating circumstance of a mental illness or emotional disturbance, the jury was told, "If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, you will so indicate by having your foreman write no in that space." [Appendix to Petition at 65] There was no suggestion that each juror could have a different ultimate answer to this question. There could be only one answer for the entire jury. A reasonable juror would have

[4] Respondent relies on the denial of certiorari in *Hunt* and the failure of petitioner in *Roper* to raise the issue on certiorari. [Brief in Opposition at 37-38] These two factors are irrelevant here since both cases involved situations where *McKoy* error might be harmless due to the absence of any effect of the instructions on the sentencing deliberations. Here, such an effect undeniably occurred because the jury failed to find many mitigating factors supported by plenary evidence.

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principles of comity and federalism encourage this practice. *Sullivan* and *Brecht* are certainly such decisions, in light of the issue decided on the basis of a harmless error analysis by the lower court. Respondent offers no reason why this Court should depart from this practice here. Thus, a remand for reconsideration in light of *Sullivan* and *Brecht* is in order.

IV. THE LOWER COURT IMPROPERLY FOUND ERROR UNDER MORGAN V. ILLINOIS HARMLESS.

Petitioner tried to question prospective jurors regarding whether they would automatically sentence him to death without requiring the prosecution to prove aggravating circumstances. The trial court prevented this inquiry and the Supreme Court of North Carolina affirmed. This Court granted certiorari and remanded for reconsideration in light of *Morgan v. Illinois*, 501 U.S. ___, 119 L.Ed.2d 492 (1992). On remand, the lower court found the error harmless because

> [t]he trial court instructed the potential jurors as to the method of finding aggravating and mitigating circumstances and the consequences of doing so. The defendant *was then allowed to question the jurors as to their ability to follow the court's instruction* in regard to these circumstances *and apply the law* according to the instructions. This should have enabled defendant to determine whether to challenge a juror on the ground he would automatically vote for the death penalty if the defendant was found guilty.

State v. Price, 334 N.C. 615, 618, 433 S.E.2d 746, 748 (1993) (emphasis added). The harmless error analysis is woefully flawed.

Morgan itself found such questioning insufficient to cure the constitutional error. Inquiries about the general fairness of prospective jurors "and 'to follow the law'

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The harmless error analysis *sub judice* was not only cursory and devoid of any exacting review of the trial record, but it also relied on precisely the kinds of questions *Morgan* itself determined to be insufficient to satisfy constitutional demands. Since the lower court relied exclusively on the very voir dire inquiry held insufficient in *Morgan* itself, summary reversal is warranted. If not, because *Brecht* alters the availability of federal review by the lower court's harmless error analysis and thereby necessitates more than the perfunctory harmless error analysis done below, a remand is in order.

CONCLUSION

For the reasons stated herein as well as in the Petition for a Writ of Certiorari, petitioner respectfully requests that the decision below be reversed or that a writ issue.

This the 14th day of February, 1994.

Respectfully submitted,

Gordon Widenhouse
Assistant Appellate Defender

Malcolm Ray Hunter, Jr.
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Office of the Appellate Defender
1905 Meredith Drive, Suite 200
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COUNSEL OF RECORD

93-7348

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

RICKY LEE PRICE,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

CERTIFICATE OF SERVICE

I, Gordon Widenhouse, a member of the bar of this Court, hereby certify that on the 14th day of February, 1994, one copy of the Reply to Brief in Opposition was served on Mr. Barry S. McNeill, Special Deputy Attorney General, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602, counsel for the Respondent herein, by first-class mail, postage pre-paid. I further certify that all parties required to be served have been served.

This the 14th day of February, 1994.

Respectfully submitted,

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COUNSEL OF RECORD FOR PETITIONER

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SUPREME COURT OF THE UNITED STATES

RICKY LEE PRICE *v.* NORTH CAROLINA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

No. 93–7348. Decided June 30, 1994

The motion for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the Supreme Court of North Carolina for further consideration in light of *Simmons* v. *South Carolina*, 512 U. S. ___ (1994).

JUSTICE BLACKMUN, concurring.

Although I concur in the Court's remand of this case for further consideration in light of the recent decision in *Simmons* v. *North Carolina*, 512 U. S. ___ (1994), I write to note that there remains another serious error in this case, one this Court has not reached before and does not reach today.

It is undisputed that petitioner's sentencing jury was given the very instruction found unconstitutional in *McKoy* v. *North Carolina*, 494 U. S. 433 (1990). This instruction ran afoul of *Mills* v. *Maryland*, 486 U. S. 367 (1988), by requiring that all jurors agree on the existence of a mitigating circumstance before any juror could give it effect. The North Carolina Supreme Court concluded, however, that this *McKoy* error was harmless beyond a reasonable doubt. 331 N. C. 620, 418 S. E. 2d 169 (1992). The state court's analysis does not support its conclusion.

The State Supreme Court relied on a poll of the sentencing jurors. In that poll, each juror first was asked:

> "Do you *unanimously* find from the evidence the existence of one or more of the following mitigating circumstances?"

Then, for each of ten mitigating circumstances submitted to the jury, each juror was asked, for example:

> Q: As to the mitigating factors. Number 1: This murder was committed while the defendant was under the influence of mental illness or emotional disturbance. Answer: No. Is this your answer?
>
> A: Yes.
>
> Q: Do you still assent thereto?
>
> A: Yes.

The State's Supreme Court ruled that, in this context, the question, "Is this your answer?" could reasonably be understood only as asking each juror "Is this your own individual answer?" 331 N.C., at 627, 418 S. E. 2d, at 173. Our concern, however, is "not what the State Supreme Court declares the meaning of the [poll question] to be, but rather what a reasonable juror could have understood the [poll question] as meaning." *Francis* v. *Franklin*, 471 U. S. 307, 315–316 (1985). It is equally plausible that a reasonable juror could have interpreted "Is this your answer?" to mean "Is this your, *the jury's*, answer?" Since the jurors had been instructed that they could answer "yes" only if they unanimously agreed, a juror's answer to the poll question easily could have meant, "Yes, that was our answer, because we could not achieve unanimity on the existence of that factor." Or even if the juror was answering for himself, he could be saying "Yes, that was my answer, but only because I could not get the others unanimously to agree that this mitigating circumstance existed." Jurors are presumed to follow their instructions. See *e.g.*, *Yates* v. *Evatt*, 500 U. S. 391, 403 (1991); *Richardson* v. *Marsh*, 481 U. S. 200, 211 (1987).

Given the ambiguity of the poll, I "cannot say with any degree of confidence which interpretation [Price's] jury adopted," *Mills*, 486 U. S., at 383, and consequently, I cannot conclude that the *McKoy* error was harmless. A finding of harmlessness is warranted only if it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman* v. *California*, 386 U. S. 18, 24 (1967). Because the unanimity instruction preceded and shaped the jury's consideration of mitigating evidence, it may have contributed to the verdict by directing the jury to "examin[e] the evidence with the wrong question in mind." *Yates* v. *Evatt*, *supra*, at 413 (SCALIA, J., concurring). The poll tells us nothing about how the juror would have voted—either on a particular mitigating circumstance or on the ultimate life-or-death question—had he been instructed that he could give effect to all the mitigating evidence, as the Constitution requires. Thus, the state court's analysis does not satisfy the "high standard" of harmlessness for federal constitutional error. See *Sochor* v. *Florida*, ___ U. S. ___, ___ (1992) (O'CONNOR, J., concurring); see also *Clemons* v. *Mississippi*, 494 U. S. 738 (1990) (remanding a case to state court for "detailed explanation" and analysis of its conclusion of harmlessness).

Because the poll does not demonstrate convincingly, much less beyond a reasonable doubt, that no juror interpreted the unconstitutional instruction to block consideration of mitigating evidence on which the jurors were not unanimous, I do not share the state court's "confiden[ce]" that the poll "demonstrates unequivocally" that the instruction did not prevent any juror from giving weight to any mitigating evidence. See 331 N.C., at 628, 418 S.E. 2d, at 173. Concern that the *McKoy* instruction may have precluded consideration of relevant mitigating evidence is only fueled by the North Carolina Supreme Court's acknowledgement "there [wa]s evidence which support[ed] several of the mitigating circumstances not found by the jury." 331 N.C., at 628, 418 S.E.2d,

at 173. *Cf. McNeil* v. *North Carolina*, 494 U. S. 1050 (1989) (KENNEDY, J., dissenting from grant of certiorari) (noting that *McKoy* error may be harmless where the defendant did not present mitigating evidence).

It is true that this is the third time we have remanded this case for further consideration in light of an intervening decision, again providing the state court the opportunity to consider and to correct constitutional error. See 498 U. S. 802 (vacated and remanded in light of *McKoy* v. *North Carolina*, 494 U. S. 433 (1990)); 506 U. S. ___ (vacated and remanded in light of *Morgan* v. *Illinois*, 501 U. S. ___ (1992)). On this remand, if the North Carolina Supreme Court concludes that there is *Simmons* error that requires resentencing, the new sentencing jurors will not receive the now-abandoned *McKoy* instruction, and the case will be purged of any existing nonharmless *McKoy* error. But if petitioner does not receive a new sentencing hearing, I believe the harmlessness of the *McKoy* error deserves this Court's attention on the next round, notwithstanding petitioner's previous visits to this Court.